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Supreme Court of the United States

October Term, 1963

No. [redacted] 181

HENRY J. THOMAS, JAMES FARMER, JOHN LEE COPELAND, ERNEST PATTON, JR., GRADY H. DONALD, PETER ACKERBERG, JAMES LUTHER BEVEL, PAULINE EDYTHE KNIGHT, CHARLES DAVID MYERS, CAROLYN YVONNE REED, JOSEPH JOHN McDONALD, RAYMOND RANDOLPH, JR., ALEXANDER ANDERSON, LESTER G. McKINNIE, WILLIAM E. HARBOUR, ZEV AELONY, MARVIN ALLEN DAVIDOV, CLAIRE O'CONNOR, DAVID KERR MORTON, KATHERINE A. PLEUNE, ROBERT FILNER, ELIZABETH S. ADLER, SANDRA NIXON, TERRY SUSAN PERLMAN, EDWARD J. BROMBERG, LESTRA ALENE PETERSON, THOMAS VAN ROLAND, JOAN FRANCES PLEUNE and GRANT HARLAN MUSE, JR.,

Petitioners,

—v.—

STATE OF MISSISSIPPI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE

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OCTOBER TERM, 1963

No. .....

HENRY J. THOMAS, JAMES FARMER, JOHN LEE COPELAND, ERNEST PATTON, JR., GRADY H. DONALD, PETER ACKERBERG, JAMES LUTHER BEVEL, PAULINE EDYTHE KNIGHT, CHARLES DAVID MYERS, CAROLYN YVONNE REED, JOSEPH JOHN McDONALD, RAYMOND RANDOLPH, JR., ALEXANDER ANDERSON, LESTER G. McKINNIE, WILLIAM E. HARBOUR, ZEV AELONY, MARVIN ALLEN DAVIDOV, CLAIRE O'CONNOR, DAVID KERR MORTON, KATHERINE A. PLEUNE, ROBERT FILNER, ELIZABETH S. ADLER, SANDRA NIXON, TERRY SUSAN PERLMAN, EDWARD J. BROMBERG, LESTRA ALENE PETERSON, THOMAS VAN ROLAND, JOAN FRANCES PLEUNE and GRANT HARLAN MUSE, JR.,

Petitioners,

—v.—

STATE OF MISSISSIPPI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioners pray that a writ of certiorari issue to review the judgments of the Mississippi Supreme Court entered in the above-entitled cases as set forth in "Jurisdiction," *infra*.

Opinions Below

The opinions of the Mississippi Supreme Court are reported as follows: *Thomas* v. *State*, 160 So. 2d 657 (App. p. 1a); *Farmer* v. *State*, 161 So. 2d 159 (App. p. 36a); *Knight* v. *State*, 161 So. 2d 521 (App. p. 40a). The remain-

ing cases were decided by brief opinions affirming on the authority of the *Farmer* and *Thomas* cases. Their citations are set forth in the footnote below.[1]

Jurisdiction

The judgment of the Mississippi Supreme Court in *Thomas* v. *State*, No. 42,987, was entered on February 17, 1964. Judgments in *Farmer* v. *State*, No. 42,983; *Bevel* v. *State*, No. 42,960; *Aelony* v. *State*, No. 42,980; *Davidov* v. *State*, No. 42,723; *McDonald* v. *State*, No. 42,970; *Van Roland* v. *State*, No. 43,029; *Myers* v. *State*, No. 42,968; *Peterson* v. *State*, No. 43,034; *Patton* v. *State*, No. 42,956; *Katherine Pleune* v. *State*, No. 42,957; *Copeland* v. *State*, No. 42,722; *Muse* v. *State*, No. 42,975; *O'Connor* v. *State*, No. 42,982; *Joan Pleune* v. *State*, No. 43,036; *Donald* v. *State*, No. 42,951; *Nixon* v. *State*, No. 42,966; *Filner* v. *State*, No. 42,978; *Anderson* v. *State*, No. 42,985; *Perlman* v. *State*, No. 42,961; *Harbour* v. *State*, No. 42,963; *Ackerberg* v. *State*, No. 42,984; *Reed* v. *State*, No. 43,031; *Randolph* v. *State*, No. 43,032; and *Morton* v. *State*, No. 42,973, were entered on March 2, 1964, and in *Knight* v. *State*, No. 42,958; *Bromberg* v. *State*, No. 42,967; *McKinnie* v. *State*, No. 42,971; and *Adler* v. *State*, No. 42,999, on March 9, 1964.

Suggestions of error were overruled in *Thomas*, on March 16, 1964; in *Farmer*, *Knight*, *Patton*, *McDonald*, *Bromberg*, *Filner*, *Aelony*, *Nixon*, *Myers*, *Donald*, *Ackerberg*, *Harbour*, *Perlman*, *Reed*, *Morton*, *Anderson*, *Copeland*, *Muse*, *O'Connor*, *Van Roland*, *Adler*, *McKinnie*, *K.*

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[1] *Copeland* and *Davidov*, 161 So. 2d 161; *Donald*, *Patton*, and *K. Pleune*, 161 So. 2d 162; *Bevel*, *Perlman*, and *Harbour*, 161 So. 2d 163; *Nixon*, *Myers*, and *McDonald*, 161 So. 2d 164; *Morton*, *Muse*, *Filner*, 161 So. 2d 165; *Aelony*, *O'Connor*, *Anderson*, 161 So. 2d 166; *Ackerberg*, *Roland*, *Reed*, 161 So. 2d 167; *Randolph*, *Peterson*, *J. Pleune*, 161 So. 2d 168; *McKinnie*, 161 So. 2d 520; *Bromberg* and *Adler*, 161 So. 2d 528. (See App. pp. 58a *et seq.*)

Pleune, Davidov, Bevel, Randolph, and *Peterson,* on April 6, 1964; and in *J. Pleune* on April 13, 1964.

Jurisdiction of this Court is invoked pursuant to Title 28, U. S. C., §1257(3), petitioners having alleged below, and alleging here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.[2]

Questions Presented

Whether the arrest, prosecution and conviction of petitioners, Negro and white interstate passengers, deprived them of rights protected by:

1. the due process clause of the Fourteenth Amendment in that the records are devoid of any evidence of guilt;

2. the due process clause of the Fourteenth Amendment in that the statute under which they were convicted is so vague and indefinite as to afford no ascertainable standard of guilt and fails to warn of the conduct punishable;

3. the due process and equal protection clauses of the Fourteenth Amendment in that their arrests, prosecutions and convictions were designed to enforce racial segregation required by state statutes and by ordinance of the City of Jackson in interstate facilities;

4. the First and Fourteenth Amendments to the United States Constitution in that petitioners were exercising rights of free expression and assembly in peacefully protesting racial segregation in interstate facilities;

5. Title 49, United States Code, §§3(1) and 316(d), prohibiting racial discrimination in interstate bus and train facilities;

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[2] A common writ of certiorari is filed pursuant to Rule 23(5) of the Rules of this Court.

6. Article 1, Section 8, clause 3 of the United States Constitution (the Commerce Clause) in that the prosecution of petitioners constituted an unlawful burden on commerce.

Statutory and Constitutional Provisions Involved

These cases involve Section 1 of the Fourteenth Amendment to the United States Constitution and Article 1, Section 8, Clause 3 (Commerce Clause) of the United States Constitution.

Each petitioner was convicted under Title 11, Code of Mississippi, Annotated, Section 2087.5 (1942 as amended):

> §2087.5. *Disorderly conduct—may constitute felony, when.*
>
> 1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:
>
> (1) crowds or congregates with others in or upon shore protecting structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered

so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, or

(2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(3) while in or on any public bus, taxicab, or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in subsection (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refusing to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof,

shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment; and if any person shall be guilty of disorderly conduct as defined herein and such conduct shall lead to a breach of the peace or incite a riot in any of the places herein named, and as a result of

> said breach of the peace or riot another person or persons shall be maimed, killed or injured, then the person guilty of such disorderly conduct as defined herein shall be guilty of a felony, and upon conviction such person shall be imprisoned in the Penitentiary not longer than ten (10) years.

Each case involves Title 49, United States Code, Section 316(d):

> . . . It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Each case also involves Sections 2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786.01, 7787, 7787.5 of the Code of Mississippi, 1942 and ordinance of the City of Jackson, Mississippi, adopted January 12, 1956, and recorded in Minute Book "FF," page 149. These state statutes and Ordinance of the City of Jackson are appended, *infra* pp. 46a-57a.

Statement

These are twenty-nine of more than three hundred "Freedom Rider" cases tried in Jackson, Mississippi.[3] The arrests, involving common facts relevant to the constitutional issues, occurred in 1961 in bus and train terminals in the City of Jackson.[4] Each petitioner was tried separately though common facts and identical federal constitutional and state law issues were involved. All were charged with the same offense and received identical sentences.[5] The

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[3] There are twenty-nine separate records and trial transcripts. However, the principal record is *Thomas* v. *State*, No. 42,987. The testimony and witnesses are essentially the same in all cases.

[4] Arrested at Trailways Continental Bus Terminal were: Henry J. Thomas, No. 42,987 (R. 4); James L. Farmer, No. 42,983 (R. 4); John Lee Copeland, No. 42,722 (R. 3); Ernest Patton, Jr., No. 42,956 (R. 4); Peter Ackerberg, No. 42,984 (R. 4); James Luther Bevel, No. 42,960 (R. 4); Grady Donald, No. 42,951 (R. 4); and Alexander Anderson, No. 42,985 (R. 4) (May 24, 1961). Pauline Edythe Knight, No. 42,958 (R. 4) and Charles David Myers, No. 42,968 (R. 4) (May 28, 1961); Carolyn Yvonne Reed, No. 43,031 (R. 4) and John J. McDonald, No. 42,970 (R. 4) (June 2, 1961). Raymond Randolph, Jr., No. 43,032 (R. 4) (June 7, 1961).

The following were arrested at Greyhound Bus Terminal: Lester G. McKinnie, No. 42,971 (R. 4); William Harbour, No. 42,963 (R. 3) (May 28, 1961). Katherine A. Pleune (June 10, 1961) (No. 42,957). Zev Aelony, No. 42,980 (R. 4); Marvin Allen Davidov, No. 42,723 (R. 4); Claire O'Connor, No. 42,982 (R. 4); David Kerr Morton, No. 42,973 (R. 4) (June 11, 1961). Robert Filner, No. 42,978 (R. 4) and Elizabeth S. Adler, No. 42,999 (R. 4) (June 16, 1961).

The following were arrested at Illinois Central Train Terminal: Sandra Nixon, No. 42,966 (R. 4) (May 30, 1961); Terry Susan Perlman, No. 42,961 (R. 4) (June 8, 1961). Edward Bromberg, No. 42,967 (R. 4); Lestra Peterson, No. 42,034 (R. 4); Thomas Van Roland, No. 43,029 (R. 4); Joan Frances Pleune, No. 43,036 (R. 4); and Grant Harlan Muse, No. 42,975 (R. 4) (June 20, 1961).

[5] In Municipal Court each petitioner received 60 days suspended sentence and $200.00 fine. In trials *de novo* in the County Court of Hinds County they were sentenced to four months in jail and $200.00 fine, the maximum provided by statute.

same state law and federal constitutional questions were raised in each case after trials in the Municipal and County Courts of the City of Jackson,[6] and on appeal to the Circuit and Supreme Courts of Mississippi. See *infra*, pp. 26-31.

Three affirming opinions were written for all twenty-nine cases by the Mississippi Supreme Court: *Thomas* v. *State*, No. 42,987; *Farmer* v. *State*, No. 42,983; and *Knight* v. *State*, No. 42,958. See *infra*, pp. 1a-45a. All others were affirmed without opinion, merely citing *Thomas* and *Farmer*. See *infra*, p. 58a. Therefore, for convenient presentation, the issues are brought here by petition for writ of certiorari in a single document. Supreme Court Rule 23(5), cf. Petition for Writ of Certiorari, *Gober, et al.* v. *City of Birmingham*, 373 U. S. 374.

Petitioners, white and Negro interstate passengers, were tried and convicted in the Municipal Court of Jackson under affidavits charging them with breach of the peace under Section 2087.5, Miss. Code Annot., 1942 as amended, in that they did "wilfully and unlawfully congregate with others" in "a place of business engaged in selling members of the public" and failed or refused "to move on when ordered" by a law-enforcement officer.[7] Upon conviction they were sentenced to four months in jail and $200.00 fine, which convictions were affirmed on appeal to the County, Circuit, and Supreme Courts of Mississippi.

For purposes of clarity, a resume of the facts in common in all twenty-nine cases is presented first. Events are then

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[6] The sentencing portion of each of the 29 records is identical. Record citations are indicated by name of defendant and page.

[7] (R. Ackerberg 4, Adler 4, Aelony 4, Anderson 4, Bevel 4, Bromberg 4, Copeland 3, Davidov 4, Donald 4, Farmer 4, Filner 4, Harbour 3, Knight 4, McDonald 4, McKinnie 4, Morton 4, Muse 4, Myers 4, Nixon 4, O'Connor 4, Patton 4, Perlman 4, Peterson 4, J. Pleune 4, K. Pleune 3, Randolph 4, Reed 4, Thomas 4, Van Roland 4.)

described sequentially and by place of arrest as follows: Trailways Continental Bus Station, Greyhound Bus Terminal and Illinois Central Railroad Station. Thereafter follows a detailed exposition of the facts of all the cases annotated by record citations.

Facts in Common[8]

Almost identical circumstances surrounded the arrests of these twenty-nine petitioners. All were interstate passengers protesting racial segregation in interstate bus and train facilities. All were in racially mixed groups and all were arrested by police immediately upon arrival in the City of Jackson.

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[8] In the spring and summer of 1961, more than three hundred "Freedom Riders," including these twenty-nine petitioners attempted to use travel facilities on an unsegregated basis in Jackson, Mississippi. They were arrested, jailed and later charged with violating Mississippi disorderly conduct—breach of the peace statutes. (Title 11, §§2087.5 and 2089.5.)

Though the facts and charges were almost identical, the State of Mississippi required a separate trial for each of the more than three hundred persons arrested, including these twenty-nine petitioners. Trials were conducted at the rate of two per day over a period of months. All were convicted. All were initially fined two to five hundred dollars ($200.00-$500.00) and given sentences ranging from sixty days suspended to four months in jail, not suspended. Practically all sought trials *de novo* in the County Court and posted bonds in the amount of five hundred dollars ($500.00) each to assure appearance. Two persons dismissed their County Court appeals and served out their fines and sentences. Fifty-four persons entered pleas of *nolo contendere*, paid fines and costs and accepted suspended jail sentences. The rest pleaded not guilty, had their convictions affirmed and sentences increased to a fine of five hundred dollars ($500.00) and four months in jail. Those appealing to the Circuit Court from County Court convictions were required to post additional cash bonds of one thousand dollars ($1,000.00) each, bringing bond to one thousand, five hundred dollars ($1,500.00) per person. Indeed, bond costs alone exceeds three hundred seventy-two thousand dollars ($372,000.00). Travel costs, counsel fees and other expenses have further increased the financial burden.

An additional fourteen thousand dollars ($14,000.00) was paid to the Clerk of the Mississippi Supreme Court as security for prepara-

Captain of Police Ray testified in each case that he had advance notice that petitioners were coming to Jackson to "create an incident." He had numerous police officers on the scene for the purpose of arresting them and a patrol wagon parked outside to carry petitioners off to jail. In each case, he alleged that "ugly" crowds met petitioners, though prosecution witnesses as well as petitioners contradicted Ray's testimony. In no case did Captain Ray arrest anyone in the crowd "threatening" petitioners.

In no instance did Captain Ray inquire of petitioners whether they had reason to be in the station. No allegation was made that any of the petitioners committed any act of violence or was anything but peaceful. The only evidence of guilt is their mere "presence" in the bus and train terminals in racially mixed groups. In each case, immediately upon arrival they were ordered to "move on and move out of the terminal" and upon refusal, were arrested.

State statutes as well as an ordinance of the City of Jackson required segregation in interstate bus and train facilities (App. pp. 47a-57a). At all places of arrest there were separate waiting rooms for Negro and white persons designated by "white" and "colored" signs "By Order of Police."

Hereafter follows the detailed facts upon which the above summary is based.

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tion of the twenty-nine records for this petition for certiorari. This security, like all appearance and appeal bonds posted in these cases, was in the form of cash as no surety bonds can be obtained by civil rights demonstrators in Mississippi. See Memorandum of United States as *Amicus Curiae*, pp. 2-4, on Motion for a Stay of Injunction Pending Appeal, *Bailey* v. *Patterson*, 368 U. S. 346.

Collateral proceedings arising out of these incidents are reported as follows: *Bailey* v. *Patterson*, 199 F. Supp. 595 (S. D. Miss. 1961), vac. 369 U. S. 31; on remand 206 F. Supp. 67 (S. D. Miss. 1962); aff'd in part and rev'd in part, 323 F. 2d 201 (5th Cir. 1963). See also *U. S.* v. *City of Jackson*, 318 F. 2d 1 (5th Cir. 1963).

A. *Trailways Continental Bus Station:*

1. May 24, 1961:

Petitioners Thomas, Farmer, Copeland, Patton, Donald, Ackerberg, Anderson and Bevel[9] boarded Trailways buses in Montgomery, Alabama for Jackson, Mississippi on May 24, 1961[10] (R. Thomas 562-63). The buses arrived in Jackson under heavy police escort (R. Thomas 406).[11] After

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[9] Petitioners Bevel's and Anderson's bus arrived in Jackson at 2:00 p. m. (R. Bevel 18; Anderson 217). They were with a racially mixed group of twelve (R. Bevel 18). Thomas, Farmer, Copeland, Patton, Donald and Ackerberg arrived in Jackson together around 4:45 p. m. (R. Thomas 409, 444) with a group of fifteen (R. Thomas 535). The facts governing the arrival of the two buses are almost identical.

[10] Petitioners had gathered in Montgomery, Alabama from various parts of the country (R. Thomas 311). Here they regrouped and travelled to Jackson (R. Thomas 311, 368, 371). W. B. Padgett, Alabama Department of Public Safety, testified:

> "I had read the itinerary [Freedom Rider] in newscasts, newspapers . . . after leaving Washington, D. C., it was from Augusta, Georgia, to Atlanta, Georgia, southern part of Georgia to Birmingham, Alabama; from Birmingham, Alabama to Montgomery, Alabama; from Montgomery, Alabama to Jackson, Mississippi; from Jackson, Mississippi, to New Orleans, Louisiana and lower end of Louisiana" (R. Thomas 374, 375).

[11] Padgett was at the Alabama-Mississippi state line when the first and second "Freedom Rider" buses crossed on May 24, 1961 (R. Thomas 394-398, 373, 377), and testified:

> ". . . After the first bus passed through the state line into Mississippi, the officers escorting that bus from Montgomery to the state line remained there until the second bus passed through. That would have made . . . approximately twenty-eight units of automobiles transporting state investigators, highway patrol officers, National Guard, with each bus. There were approximately five cars with heavy arms" (R. Thomas 399).

He also stated:

> "At the time the [second] bus actually arrived at the line, . . . there was one helicopter and two or three airplanes circling the area, maintaining air surveillance over this area.

* * * * *

National Guardsmen and newspapermen unboarded (R. Thomas 565; Farmer 25; Bevel 22-23), petitioners walked quietly down the ramp between two lines of newspapermen and policemen[12] (R. Thomas 565, 593-594; Bevel 24) into the white waiting room[13] (R. Thomas 505, 606-607). Captain of Police Ray testified that "50 or 60 people" were inside the terminal including "twenty-five" newspapermen (R. Thomas 566, 617)[14] and "six or eight police officers." About 75 policemen with three police dogs surrounded the bus station (R. Bevel 19; Farmer 21).

Ray also testified that he had advance notice that petitioners were coming to Jackson to "create an incident" and was present at the terminal "to maintain law and order" (R. Thomas 573-574, 613; Bevel 18). He stated that people in the terminal were in a "foul mood" and "as they [peti-

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"There was no incident . . . At the time the bus actually transferred from Alabama to Mississippi, there were an estimated one hundred highway patrolmen, and National Guardmen, and a large group of Mississippi highway patrolmen and Mississippi National Guard at the time of the actual transfer" (R. Thomas 400).

[12] Captain of Police Ray testified in *Thomas*:

"The Trailways bus arrived about 4:45 p. m., parked in loading dock number eight, and after this bus stopped, a group of National Guardmen got off the bus, then a group of newspapermen or reporters, people with cameras and so forth, got off the bus; then a group of fifteen, of which Henry Thomas was one of them got off the bus. They kind of stayed together until they began walking down the ramp (R. Thomas 565).

* * * * *

"They walked in the door to the waiting room" (R. Thomas 539).

[13] The main waiting room located on the west side of the terminal was designated for white persons (R. Thomas 505, 507, 591-592), with a smaller waiting room on the east side of the terminal for Negroes.

[14] Ray testified that "thirty or forty" people were in the terminal when petitioner Bevel arrived (R. Bevel 18). See, too (R. Farmer 19).

tigners] entered the terminal, feeling that it would be best to get . . . the group . . . out of the bus station, in order to prevent violence, I . . . ordered them to move on and to move out of the terminal. They acted as though they did not hear me even though I talked in a loud tone of voice" (R. Thomas 571). However, he neither spoke to nor arrested persons allegedly threatening petitioners (R. Thomas 624; Bevel 28; Donald 34; Farmer 27; Ackerberg 73).

Wallace Dabbs, a reporter for the *Clarion Ledger* and a prosecution witness, testified that petitioners caused no violence at the time they entered the bus terminal (R. Thomas 503, 513), and that they walked peacefully into the white waiting room (R. Thomas 503, 505). Moreover, "no incidents" or "remarks of an offensive nature" occurred inside the terminal (R. Thomas 513, 631; Farmer 28), and police were "maintaining superb order in the station" (R. Thomas 513, 514).[15]

Another prosecution witness, W. C. Shoemaker of the *Jackson Daily News* testified that he saw no act of violence committed either by petitioners or other persons in the station (R. Ackerberg 52) and that the police had "everything under control"[16] (R. Thomas 541, 544, 545, 546; Farmer 38).

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[15] On cross-examination, Dabbs testified:

"Q. So the upshot of it is that during the entire period from the time that defendant arrived in the white waiting room until you saw him taken away in the paddy wagon, you saw no violence or anything untoward at all?

A. No.

Q. And the police had the situation outside on the street as much under control as they had inside the terminal?

A. I would say so, yes.

* * * * * *

Q. You saw no violence in Jackson whatsoever?

A. No, that's true" (R. Thomas 517).

[16] Shoemaker wrote an article on the May 24 events which appeared in the *Jackson Daily News* on May 25, in which he stated that when the "Freedom Riders" arrived only "a few persons

(a) *Bevel and Anderson*

Petitioners Bevel and Anderson, both Negroes (R. Bevel 75-76; Anderson 239), arrived in Jackson on the first bus around 2:00 p.m. in a racially mixed group of twelve (R. Bevel 18; Anderson 217). Inside the terminal eight of them went to the restroom while four walked to the concession stand (R. Bevel 25; Anderson 218).

Captain Ray testified that he arrested the four at the concession stand first and then went into the restroom and arrested the other eight defendants (R. Bevel 30). Bevel, Anderson and their companions were alone in the restroom when Captain Ray entered and ordered them to "move on and move out of the terminal" (R. Bevel 25, 26; Anderson 228). They refused and were arrested (R. Bevel 26; Anderson 219). Bevel and Anderson were quiet and peaceful at all times (R. Bevel 34; Anderson 232).

(b) *Thomas, Farmer, Copeland, Donald and Ackerberg*

These petitioners arrived on the second bus at 4:45 p.m. (R. Donald 14, 15; Farmer 20; Copeland 15-16, 25-26; Ackerberg 48) in a group of "fourteen Negroes and one white" (R. Donald 51, 53). On entering the station they were ordered immediately to "move on and move out" (R. Thomas 571; Farmer 25; Copeland 28; Donald 17; Ackerberg 58, 64). When they did not respond they were arrested and taken to the police wagon which had been parked outside the terminal prior to their arrival (R. Thomas 625-26). Petitioner Donald testified:

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watched from the sidewalk a few blocks away." He also stated that the "police watched each arriving bus in the event more 'Freedom Riders' attempted to violate segregation laws" (R. Thomas 543).

> [W]hen I entered the Trailways bus station, several of the persons who accompanied me to the Trailways bus station were already being arrested, and I proceeded to turn around, to leave along with another companion of mine, and one officer said, 'you wait here too, you are under arrest.' He asked my name, I gave him my name, and he said, 'you are under arrest also' (R. Donald 54).

Petitioners were peaceful and quiet at all times (R. Thomas 621, 629; Donald 22; Farmer 25, 26, 36; Copeland 35).

Captain Ray, however, felt that petitioners' "presence" could cause "possible" disorder (R. Thomas 613, 620):

> Q. [T]he time you ordered defendant and his companions to leave, was there any act of violence committed, up to this moment?
>
> A. Nothing other than their presence there, by which a breach of the peace might have been occasioned (R. Thomas 613).

Ray also testified:

> Q. . . . So, the only disorderly act, if you can call it that, in the waiting room, that you saw after the arrival of the defendant and his companions, or saw anywhere in the bus terminal, was the refusal to obey your order to leave the station?
>
> A. That was the only arrest made there and that was the only disorderly conduct that had happened at that time (R. Thomas 625).

In *Ackerberg* Ray stated:

> Q. Now did you see any acts of violence committed by the defendant . . .?

A. No, his presence there was what caused the violence or would have caused it (R. Ackerberg 69).

2. May 28, 1961:

Petitioners Knight, a Negro (R. Knight 63), and Myers, a white person (R. Myers 42), were arrested around 1:30 p.m. with seven other companions in the white waiting room (R. Knight 31; Myers 15, 17).

Captain Ray testified:

> They all came in together. After they got inside the terminal, they split up. This defendant [Myers] and three others stayed together, and the other four, they moved to another part of the terminal, and then I gave them an order (R. Myers 17).

When Myers refused to obey Ray's order to move out of the terminal he was arrested (R. Myers 18). Ray further testified that everything was peaceful until Myers and his group arrived, that a crowd was in the station in an "ugly and angry" mood threatening to harm Myers (R. Myers 17), and that he "wanted to get the cause or the root of the trouble out of there and this defendant and his group was the cause or root of the trouble" (R. Myers 27). However, Ray admitted that no overt act was committed against Myers (R. Myers 27) and that Myers created no disturbance himself (R. Myers 26, 32).

> Q. All right, Captain Ray. Now, the defendant walked in, and he goes immediately to a seat and sits down. That's right?
>
> A. That's correct.
>
> Q. Did he do anything other than go immediately to this seat and sir [sic] down?
>
> A. No (R. Myers 27).

Petitioner Knight was arrested at the telephone booth when, according to Captain Ray, "other people in the station started towards her" (R. Knight 24).. No effort was made to arrest these persons (R. Knight 24, 25). Ray stated that Miss Knight:

> [W]alked into the terminal . . . She walked in with her group; they stopped. I ordered them to move on and move out of the terminal. At that time this defendant and her group separated. This defendant walked to the west-end of the waiting room to a telephone booth (R. Knight 24).

Miss Knight was quiet and peaceful at all times (R. Knight 23, 31-32).

Ray testified that "30 or 35" people were in the terminal upon petitioners' arrival along with "12 to 15" policemen (R. Myers 16).

3. June 2, 1961:

Petitioners Reed and McDonald arrived at the Trailways terminal around 6:40 in the evening (R. Reed 16). Miss Reed, a Negro (R. Reed 60) was arrested in the white waiting room when she refused to obey Captain Ray's order to move out of the terminal (R. Reed 29). Ray testified:

> Q. When you entered the waiting room, did you see the defendant?
>
> A. I did.
>
> Q. Where was she at the time?
>
> A. She was still walking. When I entered, she was walking. She was walking to the news or concession stand.
>
> * * * * *
>
> Q. Now, as the defendant entered the waiting room and walked toward the concession stand, what did you observe?

A. I observed the crowd. At that time it became in an ugly, angry mood, and I determined that this defendant was the cause of the trouble.

* * * * *

Q. I see. And did you determine who they were mad at?

A. At this defendant and her group.

Q. All right. Did you say anything to any of these people at this time, this group of people?

A. I did not at that time.

* * * * *

Q. . . . Now, when you gave your order, what was the defendant doing . . .?

A. . . . She was standing there.

* * * * *

Q. Now, what did you say to this defendant?

A. I ordered her to move on and move out of the terminal.

Q. Did the defendant say anything, make any reply?

A. She stood there as though I had said nothing (R. Reed 27-29).

McDonald, a white person (R. McDonald 67) separated from the group and entered the "Negro" waiting room where he was immediately arrested (R. McDonald 15, 16, 17).

C. R. Keys of the Jackson Police Department testified on cross-examination:

Q. In other words, he wasn't doing anything different from the other people that came in prior to his arrival that would cause disturbance in there?

A. Nothing other, only his presence.

Q. Only his presence?

A. That is correct (R. McDonald 33).

There were sixteen police officers in the terminal (R. Reed 17).

4. June 7, 1961:

Petitioner Randolph, a Negro (R. Randolph 67) and six companions entered the Trailways terminal about 1:10 in the afternoon (R. Randolph 16). Captain Ray testified:

> I arrived at the Trailways bus terminal . . . twenty minutes before this defendant and his group arrived. At that time, everything was peaceful, normal, people going about their business in a normal way. This defendant and his group came in, they got off the bus; they all waited together until they got their luggage. They walked down the ramp together until they got to the first waiting room, and at that time, three went into that waiting room, and then this defendant and two others continued on to the next waiting room, and by that time people were beginning to mill around and moving toward this defendant (R. Randolph 18).

He determined that Randolph was the "root of the trouble, he and his group" and ordered him to leave the terminal (R. Randolph 19). Randolph refused and was arrested (R. Randolph 19). Randolph was entirely peaceful and orderly (R. Randolph 33).

B. *Greyhound Bus Terminal:*

1. May 28, 1961:

Petitioner McKinnie, a Negro (R. McKinnie 66), was arrested around 5:30 a.m. in the white waiting room of the Greyhound bus terminal (R. McKinnie 15, 66).

Captain of Police Ray testified that McKinnie:

> . . . Goes in the terminal, he kind of turns to the right after he passes the ticket office and so forth, and there

is a water cooler there. He and six others were at the water cooler, and that's when I approached this defendant because the crowd was in an ugly and angry mood after this defendant entered. I saw that there was going to be trouble, I tried to determine the cause of the trouble, and I found out the cause was this defendant and his group. So, not wanting any disturbance or any violence, I was going to remove that cause and I ordered this defendant and his group to move on and move out of the terminal. I gave that order twice, I asked if they understood the order and if they were going to obey the order, and they did not and that's when I arrested them (R. McKinnie 22-23).

2. June 11, 1961:

Petitioners Aelony, Davidov, O'Connor and Morton, all white persons (R. Aelony 103; Davidov 76; O'Connor 66; Morton 69), arrived in Jackson from Memphis, Tennessee (R. Aelony 50; Davidov 14; O'Connor 16). They were arrested as they entered the Negro waiting room of the Greyhound terminal around 12:45 p.m. in a racially mixed group of six (R. Davidov 16; Aelony 50).

Captain Ray testified that "25 or 35 people" were inside the bus terminal and that they became "ugly and angry" when petitioners entered (R. Davidov 17; Aelony 46). In order to prevent violence, he "acted quickly" and asked petitioners to move out of the terminal (R. Aelony 46, 47). Petitioners refused and were arrested (R. Davidov 19). He admitted that petitioners were peaceful, but stated that their "presence" created a disturbance.

Q. Now, Captain Ray, I believe you testified that prior to this, and at this time, this defendant had said or had done nothing, to indicate that it was his purpose to create a disturbance. I mean, he had done noth-

ing, or he had said nothing, or he made no gesture that indicated that he intended to create a disturbance?

A. No, his presence there was what created a disturbance.

Q. But he didn't do anything?

A. No, he didn't (R. Davidov 30, 31).

3. June 16, 1961:

Petitioners Pleune, Filner and Adler, white persons (R. Pleune 58; Filner 74; Adler 230), arrived in Jackson from Nashville, Tennessee at 1:10 in the afternoon (R. Filner 45, 46; Pleune 15) and were arrested as they entered the waiting room of the Greyhound terminal (R. Filner 42).

Petitioner Filner testified:

> We got off the bus. There was five of us. We walked into the waiting room, in the bus station. Sat down at the counter, and I looked around and a police officer came toward us. The other people kept watching with curiosity. He [Captain Ray] came toward us and ordered us to move on, and we didn't, because it was our constitutional right to be there, and he arrested us.
>
> * * * * *
>
> Q. Was there any indication, as far as you were able to ascertain as to what mood these people were in?
>
> A. Well, they didn't cause any trouble. Of course, some of these were watching what was going on . . . just curious, I am sure. The police officer mentioned they seemed to be advancing threateningly; I didn't notice any of this. As soon as we walked in, the police officer came toward us (R. Filner 41-42).

Filner further testified that his group had been in the station only a minute when the police walked up to them (R. Filner 42), that they were peaceful and quiet and

simply wanted something to eat after a long trip (R. Filner 42).

Captain Ray testified:

> The bus pulled in. This defendant and the group that he was with got off and walked inside the waiting room, and when they entered the waiting room, people began to get up and moved toward them. That's when I felt it necessary to act, and act quickly, to prevent any violence. At that time, he had a seat at the stool, and I ordered him to move on and move out of there. I asked him if he'd heard the order and if he was going to obey the order (R. Filner 19).

Petitioners were neither noisy nor violent (R. Filner 42). Moreover, Ray could recall no actual threats against petitioners from the crowd (R. Filner 20-23).

C. *Illinois Central Train Station:*

1. May 30, 1961:

Petitioner Sandra Nixon, a Negro (R. Nixon 69), arrived at the Illinois Central train station around 10:15 in the morning (R. Nixon 15-17) with seven companions (R. Nixon 17). She entered the white waiting room and was immediately ordered to leave by Captain Ray who testified that persons in the station became restless and threatened to harm her (R. Nixon 20). Determining that petitioner Nixon and her group was "the cause or root of the trouble" he ordered her to move out of the terminal (R. Nixon 18). She refused and was arrested (R. Nixon 18). He did not inquire of her business there and stated that she at no time spoke to him (R. Nixon 27).

2. June 8, 1961:

Petitioner Perlman, a Negro (R. Perlman 61), arrived at the train terminal at 10:10 in the morning. She was arrested upon entering the white waiting room with eight others (R. Perlman 15, 20-21).

On cross-examination, Captain Ray testified:

> Q. All right, sir. Now, Captain Ray, you said that when the defendant entered the waiting room, that you were in there, I believe, when she came in?
>
> A. That's correct.
>
> Q. What was the disposition of the people who were in the waiting room when the defendant came in?
>
> A. After this defendant and her group entered, they became in an ugly and angry mood, moved toward this defendant, started mumbling to each other and that's—
>
> Q. Do you know—, pardon me.
>
> A. And that's when I determined the cause of the trouble and felt it necessary at that time to remove that cause and I ordered her to leave.
>
> Q. Did you talk to any of these people?
>
> A. At that time?
>
> Q. At that time.
>
> A. At that time, I did not (R. Perlman 23).

3. June 9, 1961:

Bromberg, a white person (R. Bromberg 37), was arrested at 5:30 in the morning as he entered the train terminal with a racially mixed group (R. Bromberg 14, 15, 20). He was neither loud nor committed any act of violence (R. Bromberg 22).

Ray stated that "about fifteen" people were in the terminal (R. Bromberg 18) and about a dozen policemen (R. Bromberg 20). He testified:

Q. Well, explain to the Court, if you would why with these other people you would ask them what their business was before ordering them to move on, whereas this defendant you ordered him to move on without making any inquiries as to what his business was?

A. Well, as I stated earlier, I was there to maintain law and order. When this defendant and his group entered, I felt it necessary to act and act quickly. I didn't feel like that I needed to go into a lengthy conversation, because I was there to prevent violence.

Q. Was there a danger of violence that day?

A. Yes, sir.

Q. Now from whom did you fear the violence?

A. We didn't know what to expect, but from the remarks that had been made anything could have happened.

Q. Well, were you afraid this defendant might become violent?

A. No, sir, but he was the root of the trouble.

Q. Did this defendant talk in a loud voice or curse?

A. No, sir.

Q. Or push anybody?

A. No, sir.

Q. Was he armed?

A. No, sir.

Q Did he do anything out of the way, anything different from what any other person ordinarily would do in the train station?

A. No, sir (R. Bromberg 22-23).

4. June 20, 1961:

Petitioners Peterson; Van Roland, Pleune and Muse, all white persons (R. Peterson 69; Van Roland 84; Pleune 73; Muse 84), refused to leave the Negro waiting room

when ordered to by Captain Ray and were arrested along with ten others (R. Peterson 17; Van Roland 15; Pleune 17; Muse 17). Petitioner Van Roland testified:

> I had my bag with me. I got off the train and walked down a platform and down some stairs, I believe it was, or a ramp into what was the terminal, the waiting room in the terminal (R. Van Roland 40).
>
> * * * * *
>
> . . . I walked into the waiting room and I decided that I wanted some lunch. So I asked the first officer that I saw if there was a lunch room in the terminal. He told me there wasn't, so I decided I would just sit down on the bench in the waiting room for a few minutes until I could find out where there was a place to eat. . . . I had just about got seated when Captain Ray approached me and he asked me to move on. I asked him why, and he didn't tell me. He just ordered me to move on again, and I didn't see any reason for doing so. And at that point Captain Ray placed me and the people with me under arrest and put us in the paddy wagon that was waiting outside (R. Van Roland 42).

Van Roland further testified that police were stationed around the walls in the waiting room and that there were no other persons in the station except the police (R. Van Roland 44).

Petitioner Muse, in the same group, testified:

> . . . I was rather heavily loaded with baggage and was the last one to get off the coach, and the others of the group that I was traveling with, had gone into the waiting room by the time I got off the platform. As I approached the waiting room, I heard voices and I arrived in the waiting room to hear 'on you all.' I subsequently

learned that that was the last of two commands to move on, and it was followed by an arrest, and we were put aboard the jail wagon (R. Muse 39).

Muse was arrested in the Negro waiting room (R. Muse 41). He saw "three colored persons sitting on benches" in the waiting room (R. Muse 41).

Captain Ray testified that Muse was present when he gave the group both orders to move on (R. Muse 50). Moreover, Ray stated that a crowd in the station was threatening petitioners at the time he arrested them (R. Muse 50, 51).

How the Federal Questions Were Raised and Decided Below

Petitioners were convicted in the Municipal Court of the City of Jackson, sentenced to sixty days suspended sentence and two hundred dollars ($200.00) fine, and appealed to the County Court of Hinds County, Mississippi for trials *de novo*. Pleas of not guilty were entered by all petitioners.

During trial in the County Court it was ruled that no evidence would be permitted as to the race of petitioners or racial segregation in travel facilities. Proof was offered at the end of trial that (1) an ordinance of the City of Jackson, Mississippi and State statutes required racial segregation on all common carriers (App. pp. 46a-57a), and (2) petitioners used the racially segregated waiting rooms on a racially desegregated basis.

At the conclusion of the State's case petitioners filed motions for directed verdict alleging:

(1) the State failed to prove the offense charged in the affidavit;

(2) a conviction would deprive them of due process of law secured by the Fourteenth Amendment to the United States Constitution because there was no evidence of guilt;

(3) that Section 2087.5 under which they were charged was unconstitutional on its face and as applied because (a) vague, (b) it failed to warn them of the conduct prohibited, and (c) it penalized conduct constitutionally protected under the First and Fourteenth Amendments to the United States Constitution;

(4) the conviction would violate the Fourteenth Amendment's equal protection clause, Article 1, Section 8, Clause 3 of the United States Constitution, as well as the Interstate Commerce Act, 49 U. S. C. 316(d) (and interpretation thereof by the Interstate Commerce Commission) in that Section 2087.5 of Miss. Code Annot., 1942 as amended, and as applied, denied them the right to use interstate bus facilities on a racially desegregated basis and deprived them of the right to move freely from state to state solely because of race.[17]

The motions were denied and petitioners were convicted and sentenced to serve four months in jail and five hundred dollars ($500.00) fine. Petitioners requested instructions to the jury requiring the jury to bring in a verdict of not guilty should they find that the only act committed by petitioners was refusing to move when ordered to do so by the arresting officer. The court refused the instruction and the jury returned a verdict of guilty.

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[17] (R. Ackerberg 32; Adler 38, 228; Aelony 75; Anderson 237, 265; Bevel 45, 73; Bromberg 36, 59; Copeland 39; Davidov 74; Donald 44; Farmer 41; Filner 36, 53; Harbour 32; Knight 35; McDonald 37; McKinnie 35; Morton 41, 67; Muse 31; Myers 35; Nixon 43, 67; O'Connor 64; Patton 40; Perlman 33, 59; Peterson 39; J. Pleune 47; K. Pleune 29, 55; Randolph 34; Reed 32; Thomas 674; Van Roland 34.)

Motions for new trial alleging that the convictions were contrary to the evidence and renewing objections raised in the motion for directed verdict were also denied.[15]

Appeals were taken to the Circuit Court for the First Judicial District of Hinds County alleging that the court below erred in:

(1) denying the motions for directed verdict;

(2) overruling the motions for new trial;

(3) refusing to permit testimony that the terminals were racially segregated by order of the Police Department, and that petitioners were in racially mixed groups; and

(4) refusing to judicially notice §§4065.3, 2065.7, 2351.5, 2351.7 and 4259 of the Miss. Code and §225 of the Mississippi Constitution, and the Jackson city ordinance (Minute Book "FF," p. 149) 1956, requiring segregation in travel facilities. The Circuit Court affirmed the convictions.

On appeal to the Supreme Court of Mississippi petitioners again alleged that the court below erred in (1) denying their motions for directed verdicts, (2) overruling the motions for new trial, (3) sustaining objections to the introduction of the ordinance of the City of Jackson requiring racial segregation in travel facilities.

In *Thomas* the Supreme Court of Mississippi affirmed the conviction and held that (1) the evidence supported the arrest and conviction of defendant for disorderly conduct, and (2) the conviction violated no state or federal law. The court stated:

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[15] (R. Ackerberg 33; Adler 229; Aelony 101; Anderson 266; Bevel 74; Bromberg 60; Copeland 66; Davidov 75; Donald 81; Farmer 69; Filner 73; Harbour 65; Knight 62; McDonald 66½; McKinnie 65; Morton 68; Muse 83; Myers 63; Nixon 68; O'Connor 65; Patton 68; Perlman 60; Peterson 68; J. Pleune 71; K. Pleune 56; Randolph 66; Reed 63; Thomas 708; Van Roland 74.)

> . . . In order for the State to convict under §2087.5, Miss. Code 1942, Rec., the following elements must be present: (1) There must be a crowding or congregating with others; (2) defendant must be in a place of business engaged in selling or serving members of the public . . . .; (3) there must be an order given to disperse or move on by a law-enforcing officer of a municipality or county; (4) the order must be disobeyed; and (5) the intent to provoke a breach of the peace, or the existence of circumstances such that a breach of the peace may be occasioned thereby.
>
> The record in this case reflects the following: (1) the defendant entered the terminal building in Jackson, Mississippi, on the day in question in the company of others; (2) the terminal is a place of business engaged in serving or selling to members of the public; (3) an officer of the Jackson Police Department ordered defendant to move on out of the area; (4) the defendant refused to obey the officer's orders and (5) the witnesses testified that at the time the defendant and his companions entered the station, the crowd of people already there became antagonistic toward defendant: that if the officer had not acted in ordering defendant to move on, there would have been violence (App. p. 12a).

The court concluded:

> In the case at bar the defendant not only knew the situation but he came to the South for the deliberate purpose of inciting violence, or, as he put it, "for the purpose of testing the Supreme Court decision in regard to interstate travel facilities." He left a trail of violence behind him in Alabama. The jury was, therefore, warranted in finding that he intended to create disorder and violence in Jackson, and that, in fact,

disorder and violence were imminent at the time when Thomas refused to obey the police officer's order to move on (App. p. 14a).

* * * * *

. . . We hold that the constitutional rights of defendant were not violated by his conviction for disorderly conduct. The state's interest in preventing violence and disorder, which were imminent under the undisputed facts, is the vital and controlling fact in this case. If the defendant had been denied the exercise of his right to enter the white waiting room, or to assemble for the purpose of exercising the right to protest or of free speech, his argument would be pertinent. But defendant is in no position to claim that he was merely exercising a constitutionally guaranteed right, for it is manifestly true that he and his associates participated in a highly sophisticated plan to travel through the South and stir up racial strife and violence. All of their activities were broadcast in a manner to create the greatest public commotion and uneasiness. When defendant and his companions reached Jackson, the police had notice of all that had transpired in Alabama. There is no evidence that the police did anything other than keep the peace. They did not deny defendant the right to enter the white waiting room and were willing and ready to escort defendant anywhere he wanted to go. This Court cannot escape the duty to accord to the police the authority necessary to prevent violence, and this is true whatever the motives of those who are about to cause the violence, or to precipitate it. In the situation the police found themselves, it was reasonable to require defendant to move on to wherever he wanted to go (App. p. 26a).

In *Farmer* the court held that the circumstances "were such that a breach of the peace was likely as a result of the presence of the appellants and those congregated with him," and in *Knight* the court again found that the evidence supported petitioner's conviction for disorderly conduct. The remaining cases were affirmed without opinion, merely citing *Thomas* and *Farmer*.

Following judgment in the State Supreme Court, suggestions of error were filed alleging, in essence, that:

(1) no evidence supported the convictions;

(2) the ordinance under which they were tried and convicted is unconstitutionally vague and failed to warn them of the conduct proscribed;

(3) the arrests and convictions were based upon a policy of racial discrimination required by city ordinance; and

(4) the convictions violated Article 1, Section 8, Clause 3 in that petitioners were deprived of the right to travel on a racially desegregated basis in interstate facilities.

Suggestions of error were overruled pursuant to which this petition for writ of certiorari is filed.

Reasons for Granting the Writ

The decisions of the Mississippi Supreme Court conflict with applicable decisions of this Court on important constitutional issues.

I.

Petitioners' Convictions Offend Due Process Because Based on No Evidence of Guilt.

Petitioners, white and Negro interstate travelers, were convicted under a disorderly conduct statute, which punishes:

> "Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned . . . crowds or congregates with others in . . . any place of business engaged in selling or serving members of the public . . . and refuses to disperse or move on, when ordered so to do by any law enforcement officer . . .

That petitioners had a clear right to use bus and train terminal facilities in the City of Jackson, Mississippi, on a racially unsegregated basis is indisputable, *Boynton* v. *Virginia*, 364 U. S. 454; *Gayle* v. *Browder*, 352 U. S. 903; *Morgan* v. *Virginia*, 328 U. S. 373; *Bailey* v. *Patterson*, 369 U. S. 373; 49 U. S. C. §316(d); 49 C. F. R. §180(a)(1)-(10) (I. C. C. regulations prohibiting racial segregation in terminal facilities serving interstate passengers), and undisputed. Despite this clear right, however, and despite petitioners' entirely lawful attempts to exercise this right, they were immediately arrested in the City of Jackson by police officers who awaited their arrival in the terminals, and were convicted. In *Thomas*, the Mississippi Supreme Court held that "the evidence shows that the officer arrested the defendant in good faith, under reasonable apprehension of an imminent breach of the peace" and that "[t]he State's

interest in preventing violence and disorder, which were imminent under the undisputed facts, is the vital and controlling fact in this case" (App. p. 26a).

This holding is patent error. It flies in the face of the records in these cases as well as repeated decisions of this Court. *Cooper* v. *Aaron*, 358 U. S. 1, affirming 257 F. 2d 33, 38-39 (8th Cir. 1958); *Watson* v. *Memphis*, 373 U. S. 526; *Wright* v. *Georgia*, 373 U. S. 284; *Buchanan* v. *Warley*, 245 U. S. 60.

In its opinion the Supreme Court of Mississippi stated that:

> . . . In order for the State to convict under §2087.5, Miss. Code 1942, Rec., the following elements must be present: (1) There must be a crowding or congregating with others; (2) defendant must be in a place of business engaged in selling or serving members of the public . . . ; (3) there must be an order given to disperse or move on by a law-enforcing officer of a municipality or county; (4) the order must be disobeyed; and (5) the intent to provoke a breach of the peace, or the existence of circumstances such that a breach of the peace may be occasioned thereby.
>
> The record in this case reflects the following: (1) the defendant entered the terminal building in Jackson, Mississippi, on the day in question in the company of others; (2) the terminal is a place of business engaged in serving or selling to members of the public; (3) an officer of the Jackson Police Department ordered defendant to move on out of the area; (4) the defendant refused to obey the officer's orders and (5) the witnesses testified that at the time the defendant and his companions entered the station, the crowd of people already there became antagonistic toward defendant; that if the officer had not acted in ordering defendant to move on, there would have been violence (R. Thomas 777-78).

The evidence in these cases clearly fails to meet the requirements for a finding of guilt under this statute. Not only is the sole evidence of "crowding or congregating" the simple fact that petitioners arrived in groups,[19] these records are barren of any indication that petitioners either intended to provoke a breach of the peace or that a breach of the peace was likely from their actions.

These petitioners did nothing unlawful. Captain of Police Ray and other prosecution witnesses agreed that petitioners were entirely peaceful and quiet at all times while in bus and train terminals in the City of Jackson, Mississippi. Not a single disorderly or violent act occurred in any terminal at any time.[20] Indeed, Ray testified that he feared no violence from petitioners. While an estimated "crowd" of white people were present in the terminals upon petitioners'

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[19] Indeed, several petitioners were arrested while sitting or standing alone or with a few other persons (R. Knight 247; McDonald 67; Van Roland 42).

[20] Q. The time you ordered defendant and his companions to leave, was there any act of violence up to this moment?

A. Nothing other than their presence there by which a breach of the peace might have occasioned (R. Thomas 587).

* * * * *

Q. So the only disorderly act, if you can call it that, in the waiting room, that you saw after the arrival of the defendant and his companions, saw anywhere in the bus terminal, was the refusal to leave—your order to leave the station?

A. That was the only arrest made there. That was the only disorderly conduct that happened at that time (R. Thomas 599-600).

In *Davidov*, Ray testified on cross-examination:

Q. Now, Captain Ray, I believe you testified that prior to this, and at this time, this defendant had said or had done something to indicate that it was his purpose to create a disturbance. I mean, he had done nothing, or he had said nothing, or he made no gestures that indicated that he intended to create a disturbance?

A. No, his presence there was what created a disturbance.

Q. But he didn't do anything?

A. No, he didn't (R. Davidov 30, 31).

arrival, numerous police officers were present to "maintain law and order." [21] The sole basis for petitioners' arrest was their mere "presence." [22]

In each case Ray testified that he had "advance notice" of petitioners' arrival, and was present at the terminals to preserve "law and order." [23] In each case he stated that a

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[21] Ray gave estimates of between 35 and 50 people as present in and around the terminals besides petitioners. However, a number of newspapermen were included in this number. Moreover, Ray's testimony is weakened by an article written by Shoemaker, a reporter for the *Jackson Daily News* and a prosecution witness in several cases, who wrote that "only a few persons watched from the sidewalk a few blocks away" (R. Thomas 543). And petitioner Van Roland testified that when he arrived at the Greyhound bus terminal, the police were the only persons present, while Ray spoke of a "crowd."

[22] On another occasion C. R. Keyes of the Jackson Police Department testified:

> Q. In other words, he was not doing anything different from the other people who came in prior to his arrival that would cause disturbance in there?
> A. Nothing, only his presence.
> Q. Only his presence?
> A. That is correct (R. McDonald 33).

[23] The principal evidence relied upon by the Court was Captain of Police Ray's testimony that he "definitely believed there would have been *possibly* a riot or some disturbance, and that *possibly* bloodshed would have taken place" (emphasis added). The records here utterly belie any such contention.

Ray and the Court also relied heavily upon the fact that some of the petitioners had met with violence in Alabama. From this the Court concluded in *Thomas*:

> "In the case at bar, defendant not only knew the situation but he came to the South for the deliberate purpose of inciting violence, or, as he put it, 'for the purpose of testing the Supreme Court decision in regard to interstate travel facilities.' He left a trail of violence behind him in Alabama. The jury was, therefore, warranted in finding that he intended to create disorder and violence in Jackson, and that, in fact, disorder and violence were imminent at the time when Thomas refused to obey the police officer's order to move on" (App. p. 14a).

The Court also pointed to the riots accompanying the attempt of James Meredith to enroll at the University of Mississippi as evidence that a race riot might have ensued from petitioner's presence. However the *Meredith* case came after petitioners' arrests.

"crowd" was in the terminal which became in an "ugly and angry mood" and began "moving towards" petitioners. Yet Ray at no time spoke to the "crowd" or ordered them to move back or out of the terminals.[24]

Evidence of an "imminent breach of the peace" is rendered even less credible in view of the numerous police officers present when petitioners arrived in the City of Jackson. Ray expressed confidence on several occasions that he had everything under control, as did other prosecution witnesses.[25]

That this evidence utterly fails to establish any conduct by petitioners which constitutes a crime is patently clear, and conviction under these circumstances is a manifest denial of due process under the Fourteenth Amendment. *Thompson* v. *Louisville*, 363 U. S. 199; *Taylor* v. *Louisiana*, 370 U. S. 154; *Garner* v. *Louisiana*, 368 U. S. 157; *Wright*

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[24] In *Perlman*, Ray testified:

Q. What was the disposition of the people who were in the waiting room when the defendant came in?

A. After this defendant and her group entered, they became in an ugly and angry mood, moved toward this defendant, started mumbling to each other and that's—

Q. Do you know, pardon me—

A. And that's when I determined the cause of the trouble and felt it necessary at that time to remove that cause and ordered her to leave.

Q. Did you talk to any of these people?

A. At that time?

Q. At that time.

A. At that time, I did not (R. Perlman 23).

[25] Dabbs, a reporter for the *Clarion Ledger*, testified on cross-examination:

Q. And the police had the situation outside on the street as much under control as inside the terminal?

A. I would say so, yes.

When the first two buses arrived at the Greyhound terminal, Ray had approximately 75 police officers in and around the station, along with three police dogs. The "crowd" consisted of between 35 to 50 persons (R. Thomas 566; Bevel 19; Farmer 21).

v. *Georgia*, 373 U. S. 284. Mere "presence" of Negroes or of Negroes and whites together in a public place is no crime, *Garner, supra*, nor is failure to obey the command of an officer when that command is itself violative of the Constitution. *Wright, supra.* Moreover, neither imagined nor real resentment by others is grounds for denying important constitutional rights. *Cooper* v. *Aaron, supra*; *Edwards* v. *South Carolina*, 372 U. S. 229, 231, 232.

II.

The Statute Used to Convict Petitioners Is So Vague, Uncertain and Indefinite as to Conflict With the Due Process Clause of the Fourteenth Amendment.

In three recent decisions, *Edwards* v. *South Carolina*, 372 U. S. 229, *Fields* v. *South Carolina*, 375 U. S. 44, and *Henry* v. *Rock Hill*, —— U. S. —— (Decided: April 6, 1964), this Court has overturned convictions obtained under a general breach of the peace statute where the offense charged was "so generalized as to be . . . 'not susceptible of exact definition.'" Here petitioners were charged and convicted under a general disorderly conduct—breach of the peace statute which punishes anyone who intends "to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned . . . crowds or congregates with others and refuses to disperse and move on" when ordered by a law enforcement officer. As construed and as applied to petitioners, this vague statute violates due process of law.

It has been shown that petitioners committed no unlawful act and that when arrested they were simply exercising lawful rights to use interstate travel facilities free of racial discrimination. Petitioners had every reason to believe their actions would be protected. Indeed, their right to be where they were is nowhere contested. Captain Ray at no

time explained to petitioners the reason for their arrest but simply ordered them to "move on and move out of the terminals." At no time did he inquire concerning their business in the station. Moreover, he allowed numerous white persons to remain who were allegedly in an "ugly" mood as a result of petitioners' presence. In fact Ray did not even speak to the many white persons milling around the terminals after petitioners' arrival.

To convict petitioners under these circumstances and under such a broad, catchall statute is to deny due process. No actual disturbance of the peace ensued nor was this required under the Supreme Court of Mississippi's construction of the statute. No specific intent to provoke a breach of the peace was necessary nor was conduct of a violent or offensive nature. Indeed, "intent to provoke a breach of the peace" was held to be satisfied by the Mississippi Supreme Court by looking at violence occurring days before in Alabama when "Freedom Rider buses" passed through that State, and Captain of Police Ray's general opinion that people in the terminals were in an "ugly and angry mood."

To permit these convictions to stand would be to hold Negroes or racially mixed groups susceptible to arrest and conviction upon entrance in any public place in the State of Mississippi. It would also render the constitutional rights of one group of persons victim to the whim of others if their mere presence offends the sensitivities of others. Constitutional rights cannot be so treated. *Wright* v. *Georgia*, 373 U. S. 254, *Taylor* v. *Louisiana*, 370 U. S. 154.

This statute does not warn that it punishes "mere presence" of Negroes and whites together in public places. Petitioners did not and could not know that merely entering a bus or train terminal was criminally punishable. While no one would agree that the State of Mississippi

could make it a crime and punish Negro or white persons who attempted to violate unconstitutional segregation practices by merely appearing in public places, in effect that is what has been done here. A person is entitled to fair warning of what acts are forbidden. *Connally* v. *General Construction Company,* 269 U. S. 385, 393. See also, *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453 ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."). *Raley* v. *Ohio,* 360 U. S. 423.

More invidious still is the use of this statute to prohibit petitioners' peaceful protest against racial segregation in interstate facilities in the City of Jackson, Mississippi. This Court constantly has warned that vague penal laws, where freedom of expression is involved, cannot be tolerated. *NAACP* v. *Button,* 371 U. S. 415, 433; *Cantwell* v. *Connecticut,* 310 U. S. 296, 308, 311.

This statute offends due process for still another reason. It provides no guide by which law enforcement officers may direct persons to move on, but vests in them complete discretion to determine when a person intends to provoke a breach of the peace or "circumstances such that a breach of the peace may be occasioned." In effect, the statute permits a policeman to order a person about public establishments for any reason he deems fit subject to the peril of criminal punishment if he fails to comply. The invitation to official abuse is well illustrated in these cases. Petitioners had a right to use bus and train facilities in the City of Jackson on the same basis as other citizens. Yet they were denied this right because Captain of Police Ray alone determined that other persons objected to the presence of racially mixed groups. Not only were petitioners forced to relinquish their constitutional rights, but they were criminally convicted. Here, as was recognized in *Nesmith* v. *Alford,* 318 F. 2d 110, 121 (5th Cir. 1963):

> . . . [L]iberty is at an end if a police officer may without warrant arrest, not the persons threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and legally and constitutionally protected, is deemed offensive and provocative to settled social customs and practices. When that day comes . . . the exercise of [First Amendment rights] must then conform to what the conscientious policeman regards the community's threshold of intolerance to be.

III.

These Convictions Constitute State Enforcement of Racial Segregation in Interstate Facilities Contrary to the Equal Protection Clause of the Fourteenth Amendment, Article 1, Section 8, Clause 2 (Commerce Clause) of the United States Constitution and 49 U. S. C., Sections 3(1) and 316(d).

The State of Mississippi is dedicated to the preservation of racial segregation in all aspects of life, public and private. 17 Miss. Code Ann., §4065.3 (Compliance with the Principles of Segregation of the Races) provides:

> [T]hat the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen, and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, . . . are hereby required . . . to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in public

> schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state by any branch of the federal government, any person employed by the federal government . . . and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks public waiting rooms, public places of amusement, recreation or assembly in this State. . . .

The Fifth Circuit Court of Appeals in *United States* v. *City of Jackson*, 318 F. 2d 1, took judicial notice of Mississippi's unyielding attitude on segregation. Judge Wisdom, writing for the Court, stated:

> We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The policy is stated in its laws. It is rooted in custom. The segregation signs at the terminals in Jackson carry out that policy. The Jackson police add muscle, bone and sinew to the signs (318 F. 2d 5-6).

At the time of petitioners' arrest, a panoply of state statutes required segregation in bus and train facilities: Title 11, §2351 (separate railroad cars for Negroes and whites); §2351.5 (railroads and other carriers required to provide separate toilet facilities for intrastate passengers); §2351.7 (separate waiting rooms for intrastate passengers); Tit. 28, §7784 (separate accommodations in railroad travel); §7785 (separate accommodations in street cars and buses); §7786 (passengers on street cars, buses, etc., required to

occupy compartments assigned); §7787.5 (separate waiting rooms in bus and train terminals to have "bold letters" designating "white waiting room, intrastate passengers," "colored waiting room, intrastate passengers." Moreover, an ordinance of the City of Jackson (Minute Book "FF" p. 149, January 12, 1956) required signs designating "white" and "colored" waiting rooms in bus and train terminals "by Order Police Dept." (see App. pp. 55a-57a). These statutes have been regularly enforced without distinction between intrastate and interstate travelers. Reporter Dabbs' article in the *Jackson Daily News* plainly stated "that the police watched each arriving bus in the event more 'Freedom Riders' attempted to violate segregation laws" (R. Thomas 543).

In *Bailey* v. *Patterson*, 199 F. Supp. 595 (1961), vac. 369 U. S. 31, an action brought by Negro plaintiffs to enjoin enforcement of these segregation statutes and ordinances in the State of Mississippi and City of Jackson, Judge Rives, in his dissenting opinion, specifically found that racial segregation was maintained in travel facilities. Bus and train terminal officials admitted the existence of "white" and "colored" signs and the Chief of Police of the City of Jackson admitted that the signs were placed by the Police Department pursuant to the City Segregation Ordinance. The Mayor of the City of Jackson testified:

> Q. * * * Does the body of the ordinance, apart from the preamble, reflect the policy of the City of Jackson as you have stated it?
>
> A. The policy of the City of Jackson is certainly adopted in the ordinance, which is based on State law, that is taken from State law, and is based on exactly what I have said, the matter of separation of the races.

Judge Rives further found that state and city officials met prior to the arrival of these and other petitioners on

May 24, 1961, and discussed plans for "dealing with the Freedom Riders"; that Captain of Police Ray thereafter arrested more than three hundred "Freedom Riders" and testified in most instances that their presence there "provoked people and caused them to become disturbed." Judge Rives concluded:

> Captain Ray ventured the opinion that there might have been incidents of violence had he not arrested the Riders, but there is no indication that the situation could not have been handled by restraining or arresting the offending party (199 F. Supp. at 613).
>
> * * * * *
>
> In this case, under the facts shown after a full trial and the law applicable to these facts, I am unable to find a bona fide breach of the peace issue. Rather, the facts clearly show that the arrest [Freedom Riders] are a simple evasion to enforce segregation (at 618).

That this is a blatant and deliberate case of state enforcement of unlawful racial discrimination requires no argument. These convictions which enforce Mississippi's declared law and policy of racial segregation are in clear violation of Federal law. They violate the Fourteenth Amendment (*Gayle* v. *Browder*, 352 U. S. 903; *Lombard* v. *Louisiana*, 373 U. S. 264; *Peterson* v. *Greenville*; 373 U. S. 244), the Commerce Clause (*Morgan* v. *Virginia*, 328 U. S. 373), and the Interstate Commerce Act (49 U. S. C. §§3(1), 316(d); *Boynton* v. *Virginia*, 364 U. S. 458; *Henderson* v. *U. S.*, 339 U. S. 816; *Mitchell* v. *U. S.*, 313 U. S. 80; *NAACP* v. *St. Louis-S. F. R. Co.*, 297 ICC 335; *Keys* v. *Carolina Coach Co.*, 64 Motor Carrier Cases 769).

IV.

These Convictions Conflict With First Amendment Guarantees of Free Speech, Assembly and Association.

Petitioners' attempt to use interstate facilities on a non-segregated basis was protected by the First Amendment to the United States Constitution. It is now clear that freedom of speech encompasses non-verbal as well as verbal utterances. *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *Burstyn* v. *Wilson*, 343 U. S. 495 (display of motion pictures); *NAACP* v. *Alabama*, 357 U. S. 449 (joining of associations); *Stromberg* v. *California*, 283 U. S. 359 (display of a flag or symbol). Indeed, a Negro sitting at a segregated lunch counter in a southern state has been recognized as engaged in a type of non-verbal expression protected by the Fourteenth Amendment. *Garner* v. *Louisiana*, 368 U. S. 157, 185 (concurring opinion).

No question exists of petitioners' right to use interstate facilities free of unlawful racial discrimination. Plainly no question exists of the propriety of petitioners' protesting unlawful racial discrimination in use of these facilities.

Edwards v. *South Carolina*, 372 U. S. 229, is controlling here. There this Court reversed breach of the peace convictions obtained after almost two hundred Negro students marched to the South Carolina State Legislature to protest racial segregation. The students sang and chanted and after forty-five minutes were ordered to disperse by law enforcement officials. Upon refusal they were arrested. While white onlookers gathered, no evidence pointed to any offensive or threatening remarks or gestures by the crowd. In reversing the convictions this Court stated that "the Fourteenth Amendment does not permit the state to make criminal the peaceful expression of unpopular views." See also, *Fields* v. *South Carolina*, 375 U. S. 44; *Henry* v. *Rock Hill*, —— U. S. —— (Decided: April 6, 1964); *Cantwell* v.

Connecticut, 310 U. S. 296, 308 ("A state may not unduly suppress free communication of views . . . in the guise of conserving desirable conditions"); *Terminiello* v. *Chicago*, 337 U. S. 1, 5.

As in *Edwards*, the records here are barren of any conduct threatening or constituting a breach of the peace. While a "crowd" of white onlookers allegedly gathered to watch petitioners, no violence occurred or was even threatened and not a single incident of any kind by anyone was cited. Indeed, Captain Ray was confident that he had ample police available to maintain the peace.

For this reason as well as those stated earlier, this writ of certiorari should be granted and the convictions reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

Opinion Below, *Thomas* v. *Mississippi*

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,987

HENRY J. THOMAS,

vs.

STATE OF MISSISSIPPI.

RODGERS, *Justice*:

An affidavit was lodged with the City Police Court of Jackson, Mississippi, charging defendant Henry J. Thomas with disorderly conduct. The ex-officio Justice of the Peace tried defendant and found him "guilty." He appealed to the Hinds County Court. The case was tried anew, with the aid of a jury, and the evidence was recorded. The jury found defendant guilty, and from the sentence of the County Court, he appealed on the record to the Circuit Court. The Circuit Judge entered an order affirming the judgment of the County Court, and from that judgment, the case has been appealed to this Court.

The defendant was charged with violating §2087.5, Miss. Code 1942, Rec., the pertinent parts of which are as follows:

> "Section 2087.5 Disorderly conduct—may constitute felony, when,

"1. Whoever with intent to provoke a breach of the the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

"(1) crowds or congregates with others in or upon * * * any other place of business engaged in selling or serving members of the public * * * and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person * * *

" * * * shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment * * * "

The record in this case shows that defendant Thomas is a Negro who resides at St. Augustine, Florida. He is a student at Howard University in the City of Washington, D. C. He learned that CORE (an organization known as Congress of Racial Equality) was planning a series of bus rides for the purpose of testing segregation laws, and he volunteered his services as a bus rider. He then received instructions as to how he should act when violence erupted; that he should hold his hands by his side when he was being beaten with bicycle chains. Extraordinary advance publicity was given through the news media, advising the public that various racially mixed groups, calling themselves "freedom riders", were enroute through Georgia, Alabama, and Mississippi, with a "stop over" at Jackson,

Mississippi. The law enforcement officers of Alabama became apprehensive to such an extent that officers were assigned to meet the busses in Atlanta, Georgia, and to ride in the busses as they proceeded across Alabama.

On May 20, 1961, three groups of "freedom riders" reached Montgomery, Alabama, and a race riot occurred on Sunday night, May 21, 1961. The Alabama officers testified upon the trial of the instant case that the racial situation in Alabama was extremely tense. Compare Abernathy v. State, —— Ala. ——, 155 So. 2d 586, where it is said "fourteen hundred national guardsmen were on duty."

When the busses in which defendant was a passenger reached Anniston, Alabama, a large group of angry people came up and beat on the bus and cursed the occupants, including the officers in it. People lay on the pavement in front of the bus, and others lay behind the bus, so that the driver could not move without injuring them. Finally, a sufficient number of police arrived to control the crowd. When the bus left, many automobiles followed it until the tires on the bus went down and it was brought to a stop. A large crowd of people went up to the bus and began to curse the occupants. A smoke bomb was thrown into the bus and it caught fire. The police arrived and after they fired their guns, the crowd retreated. The police directed defendant and other members of his party to move out to a place of safety, and they obeyed the officers. An ambulance was brought to the scene and defendant and other occupants of the bus were taken to the hospital. Bus drivers refused to operate the busses occupied by defendant and his group of demonstrators, and defendant went back to New York and regrouped under the leadership of another individual. Defendant again accompanied a

racially mixed group of persons on two busses through Alabama and into Mississippi. This time they were accompanied by Highway Patrolmen and a contingency of Alabama National Guard to the Mississippi-Alabama state line.

In the meantime radios broadcast details of the disturbance in Alabama. Television broadcast actual scenes of the riots throughout Mississippi and Alabama, and newspapers left nothing undone in an effort to tell the Nation the progress of the so-called "freedom riders." A great many agents from the Justice Department preceded the busses and "lined the highways." The people of Mississippi became highly outraged and incensed at what they believed to be an invasion aimed at the tranquillity of the peace of the people of Mississippi.

The testimony of a banker and an automobile dealer and other prominent citizens of Jackson, Mississippi, indicated that a large percentage of the citizens of Jackson was uneasy, and apprehensive that the activity of the defendant and his companions was likely to incite a riot, particularly in view of the notoriety given the so-called "freedom rider movement."

The Mississippi National Guard and the Highway Patrolmen, armed with shotguns, and using helicopters to fly over the convoy, met the busses at the Mississippi-Alabama state line, for the purpose of protecting the caravan. Thus, this entourage moved from the state line along the highway, preceded by agents of the U. S. Justice Department, toward Jackson, Mississippi. In the meantime, the police department of the City of Jackson had been informed of the progress of the group of racially mixed out-of-state demonstrators, and also of the resentment, apprehension,

and fear engendered in the minds of individuals by the invasion, heralded by news media. The police used the local radio to ask citizens to stay away from the area of the bus station. The station was isolated by the police, and a corridor was established around the block in which persons and traffic were required to "move on." Nevertheless, in spite of the precautionary efforts of the police, groups of men began to assemble outside the corridor; windows above the street in air-conditioned buildings were opened and it was observed that many persons were peering out of and leaning from the windows. Policemen, who could be spared from the picket line around the block, were stationed on the ramp outside the bus station and eight or ten within the station. Persons, who did not have a ticket, and those, who could not show that they had business at the station, were required to "move on."

The bus, in which defendant was a passenger, arrived at Jackson, Mississippi's Continental Bus Station at 4:45 P. M., May 24, 1961. The National Guard personnel debarked and moved to their appointed positions outside the bus station. Defendant, in company with his companions, proceeded up the ramp, passed by the colored waiting room, and entered the white waiting room. Nothing was done to prevent or obstruct the group from entering the white waiting room. Captain J. L. Ray was in charge of the police at the station. He followed the defendant into the white waiting room. He testified that many persons got up and moved toward defendant, and that he observed the people were in an ugly mood. He said some of the persons he had required to leave the bus station suggested "if you let us handle this situation, we'll get rid of this out-of-town group coming here, causing all this trouble

. . . ". And he further stated: "As they entered the terminal, feeling that it would be best to get this defendant, Henry Thomas, along with the group he was with, out of the bus station, in order to prevent violence, I approached this group of which Henry was a part, ordered them to move on and move out of the terminal. They acted as though they did not hear me, even though I talked in a loud tone of voice . . . ". He further said: "I definitely believe that there would have been possibly a riot or some disturbance, and that possibly bloodshed would have taken place." He said: "I gave the order twice, then I asked if they refused to obey the order, at which I received no response." He said: "I was trying to prevent violence", and when defendant refused to move on, he was arrested. The officer stated he would have been happy to have helped defendant get to wherever he wanted to go.

Testimony shows that Jackson was the destination of defendant, and there is no testimony as to why defendant would not move out of the bus station after having reached his destination, and after having asserted his right to enter the white waiting room.

There were fifteen persons in the group, including defendant, and their names and addresses were as follows: Rev. Grady H. Donald, 1423 Edgehill Avenue, Nashville, Tennessee; John H. Moody, Jr., 917 Wilcox Street, Petersburg, Virginia; John L. Copeland, 2715 Torgett Street, Nashville, Tennessee; Lucretia R. Collins, Fort Bliss, El Paso, Texas; Peter M. Ackerberg, 5424 Arlington Avenue, New York City; Clarence L. Thomas, Jr., 407 East Bradley Street, Champagne, Illinois; Henry J. Thomas, Box 156-A, Elton, Florida; Earnest Patton, Jr., 1429 John Johnson Avenue, Nashville, Tennessee; James L. Farmer, 85 Bedford Street,

New York City; John R. Lewis, 1800 White Creek Heights, Nashville, Tennessee; Frank G. Holloway, 917½ Tonty Street, New Orleans, Louisiana; Doris J. Castle, 917 Tonty Street, New Orleans, Louisiana.

I.

There are two questions presented by the appeal to be determined by this Court, growing out of two areas of legal concept: (1) Did the officer under the conditions here prevailing have the right to arrest the defendant for disorderly conduct within the meaning of §2087.5, Miss. Code 1942, Rec.; and does the evidence support the conviction? (2) Do the State and Federal Constitutions prevent the conviction of an individual under the circumstances here shown because he claims at the time to be exercising constitutional rights?

The pertinent part of §2470, Miss. Code 1942, Rec., states: "An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; . . . ".

Section 2469, Miss. Code 1942, Rec., states: "Arrests for criminal offenses, and to prevent a breach of the peace, or the commission of a crime, may be made at any time or place."

A breach of the peace was punishable under the common law, and was defined in its broad sense to include any infraction upon the public order and tranquillity by any act or conduct inciting to violence or tending to provoke or excite others to like conduct. 8 Am. Jur., §3, Breach of Peace, p. 834.

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Personal violence was not a necessary element under the common-law definition of breach of the peace. One text-writer points out: "If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens but of public morals without the commission of the offense. The good sense and morality of the law forbid such a construction." 8 Am. Jur., Breach of Peace, §3, pp. 834-835. Moreover, an act which if committed at a certain time and place would not amount to a breach of the peace, may constitute a crime if committed at another time or place under different circumstances, and whether or not the act is a breach of the peace can only be determined in the light of circumstances surrounding the act. State v. Hebert, 121 Kans. 329, 246 P. 507; 48 A. L. R. 81; Davis v. Burgess, 54 Mich. 514, 20 N. W. 540; State v. Reichman, 135 Tenn. 653, 188 S. W. 225; Shields v. State, 187 Wisc. 448, 204 N. W. 486, 40 A. L. R. 945; State v. Christie, 97 Vt. 461, 123 A. 849; 8 Am. Jur., supra, §4, p. 835; State v. Cooper, 205 Minn. 333, 285 N. W. 903, 122 A. L. R. 727.

Under the pressure of modern metropolitan life, various states have enacted laws on the subject of disorderly conduct. It has been pointed out that under the authority of some of these statutes, the failure to comply with the orders of a policeman, such as an order to move on, or to desist from picketing, may constitute disorderly conduct. See 17 Am. Jur., Disorderly Conduct, §2, p. 188; Anno. 83 A. L. R. 788; Bennett v. City of Dalton, 25 S. E. 2d 726, 69 Ga. App. 438 (1943); People v. Hipple, 263 N. Y. 242, 188 N. E. 725 (1934); People v. Ward, 287 N. Y. S. 432, 159 Misc. 328 (1936); People, on Complaint of Whelan v.

Friedman, 14 N. Y. S. 2d 389 (1939); People v. Hussock, 23 N. Y. S. 2d 520, 61 S. Ct. 733, 85 L. Ed. 1107 (1940-1941); People v. Kieran, 26 N. Y. S. 2d 291 (1940); People v. Levner, 30 N. Y. S. 2d 487 (1941); People v. Richards, 31 N. Y. S. 2d 457, 177 Misc. 912 (1941); People v. LoVecchio, 185 Misc. 197, 56 N. Y. S. 2d 354 (1945); State v. Jasmin, 168 A. 545 (Vt. 1933); People v. Kopezak, 153 Misc. 187, 274 N. Y. S. 629 (1934).

The State of New York has such a law. McKinney's Consolidated Laws of New York, Book 39, Part 1, Penal Law, §722, Disorderly Conduct, Anno., p. 383. This section makes it a violation of the law to "(3) Congregate with others on a public street and refuses to move on when ordered by the police; * * *".

In the case of People, on Complaint of Whelan v. Friedman, 14 N. Y. S. 2d 389 (1939), the Court pointed out that in the prosecution for disorderly conduct by holding a public meeting on the street and refusing to obey a police officer's order to move on, defendant could not successfully claim that his constitutional rights of free speech and to conduct public meetings in the street had been violated.

In the case of People v. Galpern, 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785, it was shown that four or five friends were congregating on a public street and an officer directed these persons, including defendant, to move on. The right of the officer to make such an order was upheld under a statutory provision specifically defining disorderly conduct, including congregation with others, on a public street, and refusal to move on when ordered by police, whereby a breach of the peace may be occasioned. The Court held that the statute applies even though defendant were con-

ducting himself in an orderly and inoffensive manner, and his acts were probably not unreasonable. The Court pointed out that "Police officers are not the final arbiters of the rights of citizens • • • Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty. The assertion of the rights of the individual upon trivial occasions and in doubtful cases may be ill-advised and inopportune. Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace. Then the Legislature may determine whether such conduct is 'disorderly', and shall subject the individual to punishment." See the following cases upholding convictions for congregating with others: Anno. 65 A. L. R. 2d 1152; People v. Bogin, 248 N. Y. 530, 162 N. E. 512; People v. Hipple, 263 N. Y. 242, 188 N. E. 725; People v. Hussock, 6 Misc. 2d 182, 23 N. Y. 2d 520, certiorari denied, 312 U. S. 659, 61 S. Ct. 733, 85 L. Ed. 1107; People v. Garvey, 6 Misc. 2d 266, 79 N. Y. S. 2d 456; People v. Friedman, 6 Misc. 2d 266, 16 N. Y. S. 2d 925.

It has been said that the general outline for legislation upon the subject in this country seems to have been furnished by the Statute of 5 George IV, Chap. 83, which was a revision of pre-existing statutes of the same class. See 17 Am. Jur. 187, Note 2, Stoutenburgh v. Frazier, 16 App. DC 229, 48 L. R. A. 220.

In State v. Taylor, 38 N. J. Super. 6, 118 A. 2d 36, the defendant, who used loud and offensive language in interference of the officer in the lawful discharge of his duty, was convicted of assault and battery on a police officer. Defendant appealed, and the appellate court sustained the

holding of the lower court. The record shows that two police officers, patrolling a beat after midnight, noticed a group of people, all Negroes, congregated around parking meters at Springfield Avenue and West Street where their automobile was parked. There had been numerous complaints about theft from parking meters, and so they walked across the street to investigate. While the officers were talking to the group, defendant came upon the scene and pushed his way into the center of the group, demanding to know what was going on. Upon being asked whether or not he belonged to the group, defendant said he did not. Whereupon, he was told that this was police business and that he should be on his way. Defendant refused to move and entered into a tirade against the officers. An altercation ensued, and the Court held, in effect, that failure to obey a police order to move on can be justified only where circumstances show conclusively that the order was purely arbitrary and not calculated in any way to promote public order.

In the instant case, in order for the State to convict under §2087.5, Miss. Code 1942, Rec., the following elements must be present: (1) There must be a crowding or congregating with others; (2) defendant must be in a place of business engaged in selling or serving members of the public (or in one of the other places enumerated in the statute); (3) there must be an order given to disperse or move on by a law-enforcing officer of a municipality or county; (4) the order must be disobeyed; and (5) the intent to provoke a breach of the peace, or the existence of circumstances such that a breach of the peace may be occasioned thereby.

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The record in this case reflects the following: (1) The defendant entered the terminal building in Jackson, Mississippi, on the day in question in the company of others; (2) the terminal is a place of business engaged in serving or selling to members of the public; (3) an officer of the Jackson Police Department ordered defendant to move on out of the area; (4) the defendant refused to obey the officer's orders and (5) the witnesses testified that at the time the defendant and his companion entered the station, the crowd of people already there became antagonistic toward defendant; that if the officer had not acted in ordering defendant to move on, there would have been violence.

It is argued, in effect, that defendant committed no violence and since he was at a place he had a right to be, he did nothing to provoke violence or a breach of peace, therefore, his arrest was illegal, although the officer may have had probable cause to believe other people were about to do violence which was engendered by the fact that he exercised his right to be in the place where he was arrested.

The evidence in this case does not bear out the position assumed by the defendant. The testimony shows that defendant was acting as an agent for an organization known as "CORE"; that this organization desired to test the segregation laws of certain states, and that in order to do so, mixed groups of people were sent into this area after advance extraordinary publicity was given, advising the people in these states that waves of mixed "freedom riders" were enroute to their community. The defendant knew that his activity and participation in a previous "freedom ride" into Alabama had precipitated violence and caused the burning of a bus and the hospitalization of the occupants. Nevertheless, the defendant "regrouped with others" to return

to this troubled section of the country again to prove his right, although he knew it was likely to "stir up the people." The evidence shows he expected to cause violence. He expected to be whipped with bicycle chains. In short, he came to Jackson, Mississippi, under the auspices of CORE to show his disapproval of segregation laws and to incite violence in a series of incidents rather than as he claimed to prove his right to travel unhampered in interstate commerce. The defendant and his companions obviously realized that such a publicized invasion might create a holocaust and race riot. It is common knowledge that such activity has created serious riots not only in the South but in other sections of the country. (See Note I.)

The officer in charge at the bus station testified, however, that he knew the situation and repeatedly stated that a riot was believed to be imminent. After the defendant and his group had reached their destination at Jackson, Mississippi, and had proven their right to enter the white waiting room, and the right to assemble, they were requested to "move on". The officer in charge, in an attempt to control the situation at a time when everyone was tense with fear to such an extent that the mere striking of a door with a kodak caused newsmen to jump—had a right to hold one crowd back and tell another crowd or individual to "move on." Suppose the officer had not asked these people to "move on", what then? It is not the business of a peace officer to try a lawsuit, but it is his business to keep the peace. The officer does not have a lawyer walking by his side advising him what to do next, and he cannot have the same calm deliberation as one may enjoy who reads of an incident from a cold, printed page. Nevertheless, an officer is not the final judge of his actions as a peace officer. His conduct is always subject to review.

In Bullock v. Tamiami Trail Tours, Inc., 266 F. 2d 326, a damage suit was brought by certain colored passengers and his "apparently white wife," both of whom were natives of Jamaica, for injuries from an assault which occurred in Florida. The Court pointed out that it was the duty of the bus company to notify foreigners of the custom of segregation in the South, and the Court said with reference to the fact that plaintiff, a colored man, was sitting in the front part of the bus with a white woman "We can visualize no stronger case than this to show a situation where two bus drivers and the bus company officials should have reasonably anticipated that mischief was hovering about and that the Bullocks were in some danger."

In the case at bar the defendant not only knew the situation but he came to the South for the deliberate purpose of inciting violence, or, as he put it, "for the purpose of testing the Supreme Court decision in regard to interstate travel facilities." He left a trail of violence behind him in Alabama. The jury was, therefore, warranted in finding that he intended to create disorder and violence in Jackson, and that, in fact, disorder and violence were imminent at the time when Thomas refused to obey the police officer's order to move on.

The Legislature may define disorderly conduct and prescribe punishment therefor. This is an offense proscribed by statute or ordinance and is not cognizable as an offense under the common law. When used in the legal sense of conduct prohibited by statute, or ordinance, it has a well-established meaning relating to public peace and good order.

We have reached the conclusion in the instant case that the acts of the defendant, under the circumstances here in-

volved, were sufficient to sustain his conviction under §2087.5, Miss. Code 1942, Recompiled.

II.

We consider next the question: Does the claim of defendant that he was exercising his constitutional rights make him immune from arrest and conviction for disorderly conduct under the facts of this case?

The gist of appellant's argument is, first, that the defendant was a traveler in interstate transportation, and, as such, he had the right to use the public facilities offered by the bus company without discrimination, and that, since he had traveled by interstate bus to Jackson, Mississippi, he was immune from arrest although his acts might have resulted in a breach of the peace.

In the outset, it should be remembered that the police power to preserve the peace and tranquillity of the people is reserved in the states subject to limitations imposed by the state and federal Constitutions. See list of cases set out under §255, 11 Am. Jur., Constitutional Law, p. 986; also 16 C. J. S., Constitutional Law, §177, p. 906, §185, p. 922; Hart v. State, 87 Miss. 171, 39 So. 523; Donnell v. State, 48 Miss. 661; State v. Armstead, 103 Miss. 790, 60 So. 778; State v. J. J. Newman Lumber Co., 102 Miss. 802, 59 So. 923.

The Fourteenth Amendment to the United States Constitution does not take away from states their police power. 11 Am. Jur., §261, Constitutional Law, p. 995; Barbier v. Connolly, U. S. Rep. 113, p. 27 (Cal. 1885).

It is also generally recognized that it is the duty of the states to preserve peace in interstate commerce and that the states have the right to do so under the state police

power. If such were not true, the highways throughout this nation would be permanently patrolled with Federal Agents. See 11 Am. Jur., Constitutional Law, §265, p. 1002; State, ex rel., Collins, Atty. Gen. v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258.

It is pointed out in the case of St. Johnsbury and Lake Champlain R. R. Company v. Hunt, 60 Vt. 588, 15 A. 186, that in order to serve a process issued in a civil action, by which he is commanded to arrest the body of the defendant, a railroad engineer, an officer may lawfully stop a train or cars run by such engineer, for the purpose of making the arrest.

We do not believe the case of Boynton v. Virginia, 364 U. S. 454, cited by appellant, is in point in this case; there the defendant was charged with having violated a trespass statute.

In the case at bar the defendant and his companions had debarked at their destination and had moved into the waiting room; they had passed the ticket window and their business with the bus company was obviously concluded. There was no good reason why defendant should not have obeyed the officer and moved out of the situation which was rapidly deteriorating into serious trouble, unless, of course, the activities of the defendant were designed to aggravate others and incite them to violence. In the present case it is apparent that the officer acted in good faith, and with reasonable cause, to prevent violence.

Feiner v. People of the State of New York, 340 U. S. 315, 95 L. Ed. 295, 71 S. Ct. 303 (1950), is particularly significant and pertinent to the constitutional issues here. A young man was making a speech in a predominantly Negro neighborhood, before a mixed audience of about 95

people, making derogatory remarks concerning public officials and indicating that Negroes should rise up in arms and fight for equal rights. In view of the excitement aroused by his speech, a police officer asked him to stop, he ignored these requests, and was arrested and convicted of disorderly conduct. The New York statute is somewhat similar to Miss. Code §2087.5. The New York Court of Appeals affirmed the conviction. 300 N. Y. 391, 91 N. E. 2d 316. The United States Supreme Court also affirmed. It gave considerable weight to the good faith finding of the trial court that the police officers were justified in taking action to prevent a breach of the peace; that the officers were acting in good faith, motivated solely by concern for preservation of order and protection of the general welfare. The Court then said:

> "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. Nor in this case can we condemn the considered judgment of three New York courts approving the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order. The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."

We think *Feiner* is in point and applicable here.

In the case of Taylor v. Louisiana, 370 U. S. 154 (1962), six Negroes were convicted in the state court of violating

Louisiana's breach-of-the-peace law, and were fined and sentenced to jail. Four of them went into a waiting room customarily reserved for white patrons at a bus depot and when requested by police to leave, they refused to do so, claiming they were interstate passengers. The other two were arrested while sitting nearby in an automobile which had brought the six to the bus station. There was no evidence of violence before, but the trial court said that the mere presence of Negroes in the white waiting room was likely to give rise to a breach of the peace and was sufficient evidence of guilt. The two petitioners sitting nearby in an automobile which had brought the six to the bus station were convicted of counselling and procuring the first four to violate the law. In that case there was also testimony that immediately upon petitioners' entering the waiting room, many of the people there became restless and some onlookers climbed in the seats to get a better view. These persons, however, moved, on order of the police. There was no evidence of violence. The record shows that the petitioners were quiet, orderly and polite. The trial court said, however, that "the mere presence of Negroes in a white waiting room was likely to give rise to a breach of the peace." The United States Supreme Court said: "Here, as in *Garner* v. *Louisiana*, 368 U. S. 157, the only evidence to support the charge was that petitioners were violating a custom that segregated people in waiting rooms according to their race, a practice not allowed in interstate transportation facilities by reason of the federal law." The conviction of the defendants was reversed.

The difference between the facts in *Taylor* and the instant case is obvious. There was no evidence to support the charge in that case, whereas in the instant case the

evidence is overwhelming that the officer acted under the police power of the State of Mississippi to preserve the peace. It is one thing to say the interstate transportation cannot be segregated and an entirely different thing to say that people may incite violence by fanfare and action calculated to incite violence.

The desire of the courts to protect the constitutional rights of individuals should not result in curtailing, or taking from the states the right and duty to preserve the peace. Beer Company v. Mass., 97 U. S. 25 (1877).

In Garner v. Louisiana, 368 U. S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248 (1961), there was a consolidated appeal from convictions in a Louisiana court under that state's breach of the peace statute. It defined disturbing the peace as "the doing of any of the following in such a manner as would foreseeably disturb or alarm the public: * * * (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public."

In *Garner*, two Negro students took seats in the lunch counter of a drug store in Baton Rouge. In *Briscoe*, the lunch counter at which seven students sought service was in the restaurant section of the Greyhound Bus Terminal in Baton Rouge. In *Hoston*, seven Negro students took seats at a lunch counter in Kress's Department Store in Baton Rouge. In all except *Hoston*, the management did not ask the defendants to leave. The manager at Kress's called the police, they arrived, and ordered the students to leave. Petitioners did nothing except ask for service, and the arresting officer said he "believed they were disturbing the peace by sitting there." When they declined to obey the order to leave, they were placed under arrest by the officer.

The Court held that the convictions were so totally devoid of evidentiary support as to render them unconstitu-

tional, under the Due Process Clause of the Fourteenth Amendment; that they did not rest upon any evidence which would support a finding that the defendants had caused a disturbance of the peace. The Court assumed that the Louisiana courts might construe the statutes to encompass the traditional common-law concept of disturbing the peace, and permitted the police to prevent an imminent public commotion, even though caused by peaceful and ordinary conduct on the part of the accused, but the court pointed out that the defendants made no speeches, carried no placards, and did nothing beyond their mere presence at the lunch counter to attract attention to themselves or others. The manager of Kress's testified that he "feared some disturbance might occur." However, this fear was completely unsubstantiated by the record. The Court pointed out that the police "who arrested the petitioners were left with nothing to support their actions except their own opinion that it was a breach of the peace for petitioners to sit peacefully in a place where custom decreed they should not sit. Such activity, and the circumstances of these cases, is not evidence of any kind, and cannot be so considered either by the police or by the courts."

In sharp contrast with *Garner*, the facts in the instant case amply sustain appellant's conviction under Code §2087.5. The evidence shows that the officer arrested the defendant in good faith, under reasonable apprehension of an imminent breach of the peace.

We are cognizant of Edwards v. South Carolina, 372 U. S. 229, 9 L. Ed. 2d 697, 83 S. Ct. 680 (1962), where 187 Negroes, charged under the common-law crime of breach of the peace, were convicted under the following facts: The defendants gathered at a church and then walked to the

South Carolina Statehouse grounds in Columbia, the capital. Their purpose was to protest their dissatisfaction with alleged discriminatory actions against Negroes. Thirty-six officers were present, and they were permitted within the next thirty or forty minutes to walk single file or two abreast in an orderly way through the grounds, carrying placards. During this time 200 to 300 onlookers had collected, and during this period, there was no evidence to suggest threats, but mere curiosity. The police advised the defendants that unless they dispersed within fifteen minutes they would be arrested. The Negroes declined to do so, and they were arrested. The Supreme Court of South Carolina affirmed the conviction. The United States Supreme Court on appeal accepted the South Carolina court's decision that the petitioners' conduct constituted a breach of the peace under the State law. But, on an independent examination of the record, it concluded that South Carolina infringed petitioner's constitutionally protected right of freedom of speech and assembly, and freedom to petition for redress of grievances. *Edwards* did not involve any substantial problem of balancing First Amendment rights against the police power of the state. The instant case, on the contrary, requires us to apply facts in a different context.

The question here is whether a state is constitutionally prohibited from enforcing laws to prevent breach of the peace in a situation where city officials in good faith believed, and the record shows without dispute, that disorder and violence were imminent, merely because the activities constituting that breach involve claimed elements of constitutionally protected speech and assembly. The answer, we think, is clearly in the negative, on the basis of the un-

disputed facts in this record. The constitutional rights of appellant to assemble with others and to freely express his views are manifest. Yet they are and must be subject to the preservation of good order, under the police power of the state, where violence and disorder are imminent.

In People v. Kopezak, 274 N. Y. S. 629, the Court held that, although defendants had the right as a group to gather or assemble for lawful purposes to protest in peaceful manner against injustices or oppressions, nevertheless, their walking up and down the street in front of their landlord's premises, carrying signs asking for a rent-strike against firetrap conditions, constituted disorderly conduct.

People v. Levner, 30 N. Y. S. 2d 487, involved hundreds of pickets, members of a union and of organizations with similar interests, who gathered with placards to picket the mayor's home at a time when he was on vacation. It was held there was justification for the police officer's order for them to disperse, and those who refused to obey were properly found guilty of disorderly conduct. The Court pointed out that a police officer need not wait to take action until the crime or disorder has occurred, since his obligation is also preventive, and that the constitutional rights of peaceful assembly and freedom of speech did not permit the defendants to violate a law against disorderly conduct.

In People v. Richards, 177 Misc. 912, 31 N. Y. S. 2d 457, where a Long Island State Park Commission concessionaire operated a restaurant as a necessary facility in a state park, there was no labor dispute in the record. Picketing of park restaurant by female pickets in bathing suits carrying signs for the purpose of secondary boycott caused large crowds to gather. The disobeying of an order of park patrolmen constituted disorderly conduct, and a violation

of an ordinance of the commission prohibiting display of advertising in parks and prohibiting parades except by permit in parks and requiring all persons to obey orders of local park officers did not violate the defendants' right of assembly and free speech; since these rights are relative and may be regulated in the interest of all, and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order.

In People v. Burman, 154 Mich. 150, 117 N. W. 589, where the court was considering a conviction of a defendant for carrying a red flag in a parade in violation of an ordinance relating to riots and disturbances, etc., (but which did not in turn refer to the carrying of red flags) it was held that the carrying of red flags in the parade violated the ordinance, and there is no constitutional right to display a red flag in a procession where those composing the procession know that the natural and inevitable consequence will be to disturb the public peace and tranquillity, in violation of the ordinance. Freedom of speech and assembly are not absolute, but may be restricted under the police power of the state. Whitney v. California, 274 U. S. 357, 71 L. Ed. 1095, 47 S. Ct. 641; Hughes v. Superior Court, 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718; International Brotherhood v. T. C. W. H. Union & Hanke, 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773; State v. Sugarman, 126 Minn. 777, 148 N. W. 466.

In People v. McWilliams, 22 N. Y. S. 2d 571 (1940), the defendant was arrested under a charge of making an anti-Semitic speech in violation of New York's disorderly conduct statute, §722, Subsecs. 1, 2, of the New York Penal Law, viz:

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"Section 722 of the Penal Law reads in part as follows:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; * * *."

The Court's opinion stated:

"As recently stated by the Court of Appeals in a case under section 722, 'acts charged as disorderly conduct must be public in character, and such as actually do tend to disturb the public peace and quiet.' People v. Monnier, 280 N. Y. 77, at pages 78 and 79, 19 N. E. 2d 789, 790.

"It is not essential that there be an actual breach of the peace. People v. Nesin, 179 App. Div. 869, 167 N. Y. S. 49; People v. Bevins, 74 Misc. 377, 134 N. Y. S. 212, affirmed 149 App. Div. 935, 134 N. Y. S. 1141.

"The test in each case is whether the defendant's conduct under the circumstances is likely to lead to disorder or public disturbance. It will be seen that, in applying this test, the courts have necessarily passed judgment upon the competing social interests that would be served by the defendant's freedom of action, and those served by penalizing his conduct and utterances as objectionable.

"It has also been held that to violate the statute, the threat need not be verbal; it may derive its significance from the circumstances. People v. Sinclair, 86 Misc. 426, at page 435, 149 N. Y. S. 54, affirmed People on Complaint of Wilson v. Sinclair, 167 App. Div. 899, 151 N. Y. S. 1136.

"The right to assemble peaceably in the streets and public places of the city, like the right to distribute literature, is protected against state interference by the Federal Constitution. Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954, 964, 83 L. Ed. 1423.

"In that case, however, the court specifically said that this right 'may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order.'

* * * * *

"As in the case of all 'relative' rights, the point at which conduct in the course of a meeting becomes unlawful must be ascertained by the words employed, the intent of the speaker, the reaction of those there assembled and to some extent, where necessary, by balancing conflicting social interests. Against the public interest in freedom of discussion, it is necessary to weigh 'general comfort and convenience' and the 'peace and good order' of the community * * *

"The opinion thus recognizes not only the power of the State to punish abuses of the right, but its duty to maintain order in connection with street meetings. That duty is discharged, in this State, by the enforcement of section 722 of the Penal Law."

In summary, we hold that the constitutional rights of defendant were not violated by his conviction for disorderly conduct. The state's interest in preventing violence and disorder, which were imminent under the undisputed facts, is the vital and controlling fact in this case. If the defendant had been denied the exercise of his right to enter the white waiting room, or to assemble for the purpose of exercising the right to protest or of free speech, his argument would be pertinent. But defendant is in no position to claim that he was merely exercising a constitutionally guaranteed right, for it is manifestly true that he and his associates participated in a highly sophisticated plan to travel through the South and stir up racial strife and violence. All of their activities were broadcast in a manner to create the greatest public commotion and uneasiness. When defendant and his companions reached Jackson, the police had notice of all that had transpired in Alabama. There is no evidence that the police did anything other than keep the peace. They did not deny defendant the right to enter the white waiting room and were willing and ready to escort defendant anywhere he wanted to go. This Court cannot escape the duty to accord to the police the authority necessary to prevent violence, and this is true whatever the motives of those who are about to cause the violence, or to precipitate it. In the situation the police found themselves, it was reasonable to require defendant to move on to wherever he wanted to go.

III.

Finally, it is contended that the statute (§2087.5) under which defendant was prosecuted is so vague and uncertain that it is void and unenforceable. Mississippi has not yet

passed on this question, but it appears that our statute is somewhat similar to that of the New York Penal Law, Consol. Laws, p. 49, §722.

The New York court pointed out in People v. Hussock, 23 N. Y. 2d 520, cert. den., 312 U. S. 659, 61 S. Ct. 733, 85 L. Ed. 1107, that, "It is clear from the record that although the complaint especially charged a violation of subdivision 2 of said Section 722, the Court found defendant guilty of refusing to move on when ordered so to do by the policeman. In other words, the conviction was based upon a violation of Subsection 3 of said Section 722, pursuant to which a person may be adjudged guilty of disorderly conduct 'who congregates with others on a public street and refuses to move on when ordered by the police.' * * * A great deal of appellant's brief is taken up by the contention that Section 722 as applied by the Court below is unconstitutional in that it deprives defendant of his liberty of assembly, freedom of speech and of the press and of his liberty to worship according to the dictates of his conscience. * * * From a reading of the record we are of the opinion that defendant was properly convicted * * * ."

In United States v. Harriss, 347 U. S. 612, the Court held: "If the general class of offenses as to which a statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." See: Roth v. United States, 354 U. S. 476; Winters v. New York, 333 U. S. 507.

After careful analysis of §2087.5, Miss. Code 1942, Rec., we conclude that it is not vague and indefinite, and does not deny appellant in this respect due process of law under the Fourteenth Amendment to the Constitution of the United States. The act points out in specific terms the

elements of the offense and the constituent elements of it. See Amsterdam, The Void for Vagueness Doctrine, 109 U. of Pa. L. Rev. 67 (1960), reprinted in Selected Essays on Constitutional Law, pp. 560-599 (1963).

We are therefore of the opinion that the order of the circuit court affirming the judgment and conviction of the defendant in the county court should be affirmed.

CONVICTION AND SENTENCE OF DEFENDANT AFFIRMED. ALL JUSTICES CONCUR.

Note 1:

Under the authorities of this State, this Court can take judicial notice of historical facts. Day v. Smith, 87 Miss. 395, 39 So. 526; Clark & Company v. Miller, 154 Miss. 233, 122 So. 475; Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A. L. R. 2d 1425. This Court does take notice that the citizens of Mississippi later (September 30, 1962) underwent the shock of such a riot at the University of Mississippi, in which lives were lost and property was damaged. The President of the United States sent into Mississippi some 32,000 regular Army troops, and these troops remained in Mississippi for many months.

Concurring Opinion, *Thomas* v. *Mississippi*

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,987

HENRY J. THOMAS,

v.

STATE OF MISSISSIPPI.

BRADY, *Justice*, Specially Concurring:

I concur in the opinion of my colleagues, and suggest these additional reasons why the verdict and sentence of the trial court should be affirmed.

An objective, factual analysis of the circumstances which existed at the time appellant was arrested clearly and unequivocally distinguishes this case from the cases relied upon by appellant in support of his contention that his arrest was illegal, and violated his constitutional rights of speech, assembly, non-segregated travel in interstate commerce, and the due process clause of the Fourteenth Amendment.

The cases cited in the majority opinion are *Garner* v. *Louisiana*, where two Negro students took seats at a lunch counter in a drugstore; *Briscoe* v. *Louisiana*, where seven students sought service in the restaurant portion of a Greyhound Bus Terminal; *Hoston* v. *Louisiana*, where seven Negro students took seats at a lunch counter in a variety store; and *Taylor* v. *Louisiana*, where four Negroes

went into the white waiting room of a bus depot leaving two companions outside sitting in the car which had brought all six to the station.

The records prove that in all of the four cases cited above the petitioners did absolutely nothing but seat themselves and ask to be served. There is no trail of turmoil and violence following the petitioners along their routes to their destinations. No national racial organizations were financing and master-minding their courses of action as in the case at bar. No National Guardsmen accompanied the other petitioners, in a bus, in order that safe travel might be afforded them, as was the case here. In these four cases and all others cited by appellant there was no anticipated, large-scale, exacerbated conflicts, no deliberate mass generation of strife and turmoil, no sectional campaign strategy involving several sovereign states with premeditated interstate movements synchronized and methodically executed step by step, which, when interrupted by mob violence, required a retreat and reforming of plans and procedures and a recoaching and retutoring of the participants—all of which is shown to exist in the case at bar.

In the four above cited cases, and in all the other cases cited by appellant, we find the foregoing evidentiary facts wanting. In addition thereto, in the cases relied upon by appellant there was not, as is in the case at bar, a nation-wide, hourly publicity program carried on through the media of television and radio hook-ups, which on the hour or half-hour interrupted all programs to propagandize and publicize the misnamed "Freedom Riders" sorties. In the cases cited by appellant there were no fourteen hundred National Guardsmen called into service to prevent mob violence,—or seventy-five policemen who had to be detailed to the bus stations to isolate the same by a cordon from

contact with any persons save those properly using the terminal.

The Attorney General's Office and the Justice Department played no part in the four and other cases, but in the case at bar a vital role was played and Department of Justice officers accompanied the riders. In the four and other cases cited by appellant there was little or no concern or excitement, while in the case at bar, because of the publicity, propaganda, trail of violence aforesaid, excitement and feeling had risen to a fever pitch so that when the busses arrived carrying appellant (and his fourteen confederates), all appellant had to do was to demurely enter the bus station like a marionette with his fourteen confederates. The stage of violence had already been set.

The perfectly executed, premeditated scheme of appellant, his associates, and affiliates, in which he played a leading role, had already created by the aforesaid propaganda a highly volatile and explosive condition at the bus station in Jackson, Mississippi, and the slightest incident would have triggered the potential violence which would have generated into a bloody riot.

The evidentiary support essential to justify the arrest of the appellant was present: The order of the policeman to move on was justified, not because of any subjective conclusion in his mind, but by the objection realization that a violent breach of the peace was emminent.

The case of Edwards v. South Carolina can afford but little benefit to appellant for the reason that although there were one hundred and eighty-seven Negroes who had left their church and had walked single file or two abreast around the Capitol grounds in an orderly manner carrying placards protesting discriminatory action against Negroes, the case is completely devoid of any of the premeditation,

propaganda, exciting of public feeling, acts of violence, and impending bloodshed as was present in this case. In *Edwards* the police acted after thirty or forty minutes of continuous parading because a curious crowd of some two or three hundred persons had collected on the streets to watch the picketing. The officers subjectively decided that the marching would have to stop and the marchers disperse within fifteen minutes or be arrested. The marchers did not desist and were arrested. There was absolutely no impending violence shown at the time of the arrest, but only the possibility that it might arise. The distinction between *Edwards* and this case is too obvious to merit further consideration.

The transcendent issue presented here is: Can a nonresident citizen, in a deliberate effort to prove a statute of a state unconstitutional, while traveling in interstate commerce, violate with impunity that statute and other statutes regulating the maintenance of peace, order and tranquility within that State, and thus supersede or nullify the State's right to regulate and control its internal domestic affairs?

It is a corollary of durable judicial administration that the judiciary must guard and protect the respective limited powers of the separate branches of our State and Federal governments, of which it is a part, and not be an instrument for, or participate in, any procedure or function which is deliberately calculated to alter or destroy by judicial decree or fiat the very foundations upon which that representative government reposes, and which likewise insures the continued lawful and wise operation of that judiciary. It is inherent in self-government that a State shall possess the essential police powers and the right to exercise the

same in the maintenance of peace and order and in regulating and conducting its domestic affairs. Mass demonstrations, or threats thereof, intimidations, altercations and violence, or conduct calculated to incite and produce the same, are the antithesis of self-government under the law geared to the maintenance of peaceful and orderly existence.

These strife-fomenting junkets, planned by individuals and groups erroneously called "freedom riders," and poorly disguised as an exercise of constitutional guarantees, are the harbingers of government operation, not under law but under groups of men or committees, the highest expression of which is represented by the Communist order, throughout the world.

The collective rights of the citizens to enjoy peace and order and be protected from breaches thereof are synonymous with the State's duty and right to maintain peace, order and tranquility in its domestic affairs. There is nothing in the Constitution of the United States or amendments thereto, and particularly the fourteenth amendment, which gives preference to the individual rights of the citizens of the various States over their collective rights as citizens thereof. As yet the rights of the individual citizen of this country are not absolute and must yield to the rights of the majority of citizens.

If there be a paramount right essential to the maintenance of orderly and peaceful self-government in the various states, it must be the right of the State to see that its citizens are safe in their persons and in their property from nationwide mass demonstrations, intimidations, breaches of the peace and from disorderly conduct deliberately planned and calculated to cause breaches of the peace and actual violence. The degree to which this collective right of the citizens is successfully protected by the States

and subdivisions thereof varies directly with their respective authority and power to maintain peaceful and orderly conduct among all citizens—the primary objective of self-government.

In order that the sacred individual rights of the citizens may not be impaired and may endure, it is imperative that the various states be permitted to perform their inherent, common law duties and prerogatives of maintaining peace and order among their citizens in all their varied personal contacts and associations. The failure, refusal, or prohibition of performance of this high duty of maintaining peace, tranquility, law and order on the part of the States or the political subdivisions thereof is a positive, certain and swift way to destroy completely all local and State governments which compose this nation, and thus create uncontrollable, endless turmoil and violence and its inescapable ultimate—a ruthless, totalitarian or monolithic State where the rights of the regimented individual count for naught.

Today when whirlwinds of strife, rebellion and revolution are shaking the foundations of most of the civilized nations of the world, because of the inability or a complete failure on the part of those nations and subdivisions thereof to maintain peaceful and orderly conduct in the usual and customary life of its citizens, we solemnly assert that the premeditated plans of a group of nonresident citizens, regardless of their social beliefs, political power or philosophy, economic or ethnic status to create strife and violence in order to test the constitutionality of State laws or city ordinances, cannot thereby vitiate or destroy the sacred, nondelegable, inexorable duty which a city or State owes to all its citizens to maintain peace and order. We hold this to be true even though the group of nonresident citi-

zens assert the subtle subterfuge that they are merely exercising their constitutional rights of freedom of speech, assembly, and uninhibited passage in interstate commerce in justification of their premeditated and well executed conspiratory scheme.

A State which cannot, or will not, protect the safety of all citizens and their property rights, which cannot, or will not, exercise its inherent common-law police powers reserved and guaranteed to it, to regulate its internal domestic affairs in such a situation as is presented here, has already lost its attributes and characteristics as a sovereign state. It is, in fact, no longer a State but some type of unautonomous association which exists merely because of the sufferance of an all-powerful entity which tolerates its existence.

With proper deference to all concerned, regardless of constitutional subterfuge, legal sophistry, or judicial legerdemain, the communal sinister and divisive plots to create antagonisms, to breed hatred, and produce violence and bloodshed in this State among peoples of different racial origin who have lived together harmoniously for almost 200 years shall not become stark realities through failure of this Court to recognize the inviolate constitutional rights of the citizens of this and other states to lawfully maintain peace, order and tranquility in their domestic affairs by punishing those persons who deliberately flaunt and violate their laws governing the same, and who simultaneously demand constitutional immunity to do so.

For these additional reasons, in my opinion, the judgment of the trial court is affirmed.

McElroy and Rodgers, *JJ.*, Join in This Opinion.

Opinion Below, *Farmer* v. *Mississippi*

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,983

JAMES L. FARMER,

vs.

STATE OF MISSISSIPPI.

GILLESPIE, *Justice*:

James L. Farmer was charged by affidavit with violation of Sec. 2087.5, Miss. Code of 1942, which denounces disorderly conduct. A judgment of conviction in police court was appealed to county court where trial de novo was had and Farmer was again convicted. From that judgment he appealed to circuit court where the case was considered on the record made in county court and the judgment was affirmed. Farmer then appealed to this Court.

On May 24, 1961, Jackson, Mississippi, was in a state of crisis. The police had information that appellant and others were coming to Jackson on a Continental Trailways bus to create an incident or trouble. The bus from Montgomery, Alabama, was scheduled to arrive at 4:45 P.M.[1] The excitement and anticipated difficulties attending ap-

[1] As a matter of interest, see *Thomas* v. *State*, No. 42,987, decided by this Court February 17, 1964. It is there reflected that appellant was a fellow traveler with Thomas, defendant in that case, and appellant and Thomas were arrested at the same time.

pellant's arrival in Jackson are indicated by the fact that the Jackson Police Department had taken elaborate precautions. Seventy-five policemen were dispatched to the immediate area of the Continental Trailways Bus Terminal. Officers were stationed on all streets in the vicinity of the bus terminal, on parking lots, on the loading ramps at the terminal, and inside the waiting rooms. People were not allowed to congregate in the area and no one was allowed to enter the immediate area of the terminal except those having business there and newspapermen. The people generally were required by the police to keep moving or otherwise do as the police directed. When the bus arrived from Montgomery, a group of armed National Guardsmen got off first, then appellant and his companions got off and entered the waiting room wherein were twenty or more newspapermen and twenty-five or more other people.

While no one actually attempted an assault on appellant with any kind of weapon, the people in the terminal were in an angry, ugly and violent mood and began converging on appellant. Captain J. L. Ray, who was in charge of the police inside the terminal, and who was sent on this mission to preserve the peace, ordered appellant to move on and out of the terminal. Appellant ignored the order and Captain Ray gave the order again. He then asked appellant if he was going to obey the order. Upon appellant ignoring Captain Ray's order and question, he was arrested. There is no evidence that appellant had any further business in the waiting room. The undisputed testimony of an experienced police officer and a newspaperman was that the circumstances were such that a breach of the peace was likely as a result of the presence of the appellant and those congregated with him. All the facts and circumstances surrounding appellant's arrest were shown by the testimony of Captain Ray and a newspaper reporter.

Opinion Below, Farmer v. Mississippi

The first question raised by appellant's brief is whether the proof was sufficient to sustain the conviction. We hold it was. The constituent elements of the offense charged are (1) a crowding or congregating with others, (2) in a place of business engaged in serving the public, (3) the giving of an order to disperse or move on by a proper officer, (4) failure to obey the order, and (5) the existence of circumstances such that a breach of the peace might be occasioned by refusal to obey the order. *Thomas* v. *State*, No. 42,987, decided February 17, 1964.

The first four stated elements were shown without question. The fifth element was also proven by sufficient evidence. The witnesses were of the opinion that the circumstances were such that a breach of the peace would probably have occurred. The circumstances attending the giving of the order to move on were shown, and the jury had ample evidence from which to draw an inference that a breach of the peace was imminent unless appellant and his party moved on to wherever they wished to go. It is significant that appellant does not claim he had any further business at the bus station. We hold that the evidence was sufficient to sustain the jury verdict of guilty. Thomas v. State, supra, and authorities there cited. The facts in the present case are substantially the same as in *Thomas*, except in *Thomas* there was evidence of the riots and violence which attended the travels of the "freedom riders" across Alabama on their way to Mississippi, and some additional testimony was offered of the excitement attending the arrival of the "freedom riders" in Jackson. Appellant concedes in his brief that the facts in the "freedom rider" cases (including *Thomas*) "show a generally identical fact pattern."

Appellant also contends that his conviction is invalid because (1) it denies him the Federal right to unsegregated interstate travel guaranteed by the interstate commerce act, and (2) the statute as applied deprives appellant of equal protection of law and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, and (3) the statute as applied deprives appellant of the right of freedom of speech, assembly, and association guaranteed by the Fourteenth Amendment to the United States Constitution, and (4) the statute on its face and as applied is so vague as to amount to a denial of the due process of law under the Fourteenth Amendment to the United States Constitution.

These exact questions were raised in *Thomas* and were duly considered and rejected by the Court in that case. It would be useless to again discuss those questions.

The appellant did not testify. He offered no testimony that he was denied the right of free speech, protest, or assembly for any lawful purpose, or to do any act relating to travel. Appellant claims immunity from the laws of this State making it a misdemeanor to disobey an officer when the officer is making a reasonable effort to prevent a breach of the peace, but offered no proof whatever that he was in fact seeking to exercise any such guaranteed right. The proof showed that Captain Ray acted in good faith in an effort to keep the peace under exceedingly difficult circumstances. It cannot be contended that Captain Ray acted arbitrarily or capriciously. The right of the police to manage people in situations such as that revealed by this record must be upheld.

AFFIRMED.

ALL JUSTICES CONCUR.

Opinion Below, *Knight* v. *Mississippi*

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,958

PAULINE EDYTHE KNIGHT,

vs.

STATE OF MISSISSIPPI.

LEE, *Chief Justice*:

Pauline Edythe Knight was convicted by the Police Justice of the City of Jackson, acting as an ex-officio Justice of the Peace of Hinds County, Mississippi, of a violation of Section 2087.5, Code of 1942, Rec., being a charge of disorderly conduct. She appealed to the County Court of Hinds County where there was a trial de novo, resulting in a verdict of guilty as charged. Thereafter she appealed to the Circuit Court of Hinds County, where the judgment and sentence was affirmed. She has prosecuted her appeal to this Court.

Simply stated, the evidence was to the following effect: The date and occurrence of this alleged offense was about 1:30 P. M. on May 28, 1961, and the place was the Continental Trailways Bus Terminal in the City of Jackson. Captain J. L. Ray and a detail of other officers from the police department of the City were sent to the Terminal for the purpose of maintaining peace and order. They dant and others were coming to the City of Jackson for had advance notice, through police channels, that the defen-

the purpose of creating an incident. The officers put in appearance at the Terminal prior to the arrival of the bus and had heard citizens of Jackson and Hinds County expressing themselves about the mission of such persons. The condition in and around the Terminal at that time was peaceful.

When the defendant and her group of seven others, after disembarking from the bus, entered the west (white) waiting room of the Terminal, the mood of the fifty people, including some newspapermen, on the inside, immediately changed. It became "ugly and nasty." The people began to move in and toward the group. The officers saw expressions on the faces of the people and heard their talk about this crowd and their accusations that the group were a bunch of agitators and trouble makers. The defendant used no vulgar or indecent language and made no unusual gestures; but she appeared to be afraid. At no time did she advise the officers that she had business in the waiting room, nor did she assert any claim that she was exercising her right of free speech or any other right.

Captain Ray, seeing the change in the attitude of the people, and deeming that the defendant and her group were the root of the trouble, and believing that, under the circumstances then existing, a breach of the peace was about to occur, twice ordered the defendant and the other members "to move on." When they refused, he arrested all of them.

The appellant has assigned and argued, in this case, the same alleged errors on the part of the trial court as were set out and argued in the case of Henry J. Thomas v. State, No. 42,987, decided by this Court on February 17, 1964, and not yet reported in the official reports. The opinion in that case deals with those several questions and cites

the authorities on which the affirmance of that case was rested. See also James L. Farmer v. State of Mississippi, No. 42,983, decided March 2, 1964, and likewise not yet reported.

The reasons set forth in those cases and the principles there enunciated also govern and control the decision in this case. A further feature of these cases will be commented upon hereafter.

On cross examination of a State witness, counsel for the defendant sought to establish the identification of the defendant by race, but the objection of the State was sustained by the court. The defendant's position was based on the Fourteenth Amendment to the Constitution of the United States and the objection should have been overruled.

Of course, the admission or exclusion of evidence must result in prejudice and harm, if a cause is to be reversed on that account. Rule 11 of the Revised Rules of the Supreme Court of Mississippi 1953. Actually the record discloses that, immediately before the State began the introduction of its evidence, the defendant was present and was arraigned and entered a plea of not guilty. Obviously the jury saw her at the time, and all during the trial, and could tell whether she was a white person or a Negro. Besides, after the State rested, counsel for the defendant, with the consent of the court, made the statement into the record, out of the presence of the jury, that the defendant was a Negro and that she went into the west waiting room of the Terminal, which was designated "white waiting room." In the first sentence of that brief, the appellant asserts: "The appellant was arrested on May 28, 1961, with a racially mixed group shortly after they entered the white waiting room of the Trailways Bus Terminal in Jackson, Mississippi."

In the Thomas case, supra, the opinion, in note 1, observed that this Court can take judicial notice of historical facts, and cited the following cases: Day v. Smith, 87 Miss. 395, 39 So. 526; Clark & Co. v. Miller, 154 Miss. 233, 122 So. 475; Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505; 10 A.L.R. 2d 1425.

This Court, like everyone else, is somewhat conversant with historical facts. Hence it knows that slavery, as a legal institution, existed in this country from the earliest Colonial days. That status continued unabated even after the Declaration of Independence was proclaimed to the world in 1776 and thereafter beyond the adoption of the Constitution itself. As a matter of fact, it took a cruel and bloody civil war to uproot it from all sections of the country. Even after the newly freed slaves were enfranchised, there was little difference thereafter in the racial attitudes insofar as social intercourse and acceptance were concerned. Certain sections of the country, since the time when the memory of man runneth not to the contrary, because of physical traits and differences between the white and colored races and other disparities, real to them although perhaps imaginary to others, observed and practiced segregation of the races. Even the Great Crusader for Freedom and the Emancipator of the Slaves recognized that these differences placed a severe limitation on the full measure of freedom for them. Separate schools, in many areas, were provided. But suddenly the equalitarian doctrine began to take root in the land and has apparently met with substantial acceptance in recent years. Within a decade novel constructions have nullified settled constitutional questions. Segregation in schools and in all means of public transportation has been declared at an end by judicial fiat. The cry by certain groups for conformity to

their beliefs rings out endlessly over the land through the various media of communications. Large numbers of people, in this broad land, are steeped in their customs, practices, mores and traditions. In many instances, their beliefs go as deep or deeper than religion itself. If, in the lapse of time, these principles, sacred to them, shall be disproved, then it may be accepted that truth will prevail. But, until those principles have been tested in the crucible of time, no abject surrender should be expected, much less demanded. History shows that there has always been friction between different ethnic and religious groups in varying degrees. Compare the intense animosity which ha existed between Jew and Arab, Greek and Turk, and Irish and English. From the lessons of history, it has been learned that "though the mills of the gods grind slowly, yet they grind exceeding small" and that human nature makes little change from day to day, month to month, year to year, and century to century.

In a free and civilized society, differences of opinion will arise, and freedom of expression must be permitted at proper times and in proper places. But a cardinal principle requires that the State must always have the power to take such measures as may be necessary to prevent violence among its disputant citizens. The Thomas case cites Feiner v. New York, 340 U. S. 315, 95 L. Ed. 295, 71 S. Ct. 303, a 1950 case, which affirmed a conviction of the defendant on a charge of disorderly conduct growing out of his inflammatory speech to an audience on the street in which there was an appeal and exhortation to racial prejudice. Tl opinion in the Thomas case pointed out the similarity of the New York statute to Section 2087.5 of the Miss. Code. It likewise cited the case of Bullock v. Tamiami Trail Tours Inc., 266 Fed. 2d 326, in which the United States Fifth

Circuit Court of Appeals dealt with the measure of care devolving upon a bus driver toward his passengers, namely, a colored man and his "apparently white wife" while sitting together on the front seat of a bus in Florida. The opinion in that case by Judge Rives pointed out that the employees of the bus company should have notified these passengers of the segregation customs in the South. The opinion said in part: "We can visualize no stronger case than this to show a situation where two bus drivers and the bus company officials should have reasonably anticipated that mischief was hovering about and that the Bullocks were in some danger."

This record, stripped down to the naked truth, established these facts: The authorities had advance notice that the defendant and others in a racially mixed group were coming to Jackson for the purpose of creating an incident. There were a substantial number of people in the white waiting room at the bus terminal and they were in a peaceable mood. When this group of Negroes and whites congregated in the white waiting room, the mood of the people changed quickly, the people gave evidence of hostility, and started toward them. The evidence showed that the officers believed that a breach of the peace was imminent. Is the officer helpless to do anything in order to avert violence? Can it be expected that he shall constitute himself as a magistrate, hold a hearing on the grounds, and decide the relative questions then existing? Anger and rage throttle reason; and, when reason is dethroned, force is the only answer. Governmental force must be empowered to prevent violence and bloodshed. Regardless of rights, none of which were then asserted, riots and bloodshed must be averted; otherwise anarchy will prevail within the country.

AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX II

Mississippi Segregation Statutes

MISSISSIPPI CODE OF 1942

§ 2351—

"If any person or corporation operating a railroad shall fail to provide two or more passenger cars for each passenger train, or to divide the passenger cars by a partition, to secure separate accommodations for the white and colored races, as provided by law, or if any railroad passenger conductor shall fail to assign each passenger to the car or compartment of the car used for the race to which the passenger belongs, he or it shall be guilty of a misdemeanor, and, on conviction shall be fined not less than twenty dollars nor more than five hundred dollars." Source: Code of 1892.

§ 2351.5—

"Every railroad company, bus company or other common carrier for hire owning, maintaining or operating a passenger depot, bus station or terminal where a waiting room for passengers is maintained and operated shall cause to be constructed and maintained in connection with such reception or waiting room two closets or retiring or rest rooms to be exclusively used by white passengers in intrastate commerce arriving and departing from such depot, bus station or terminal and the following notice shall be painted or shown in bold letters on the door of one: "Rest Room, white female only in intrastate travel", and on the other: "Rest Room, white male only in intrastate travel"; and likewise two closets or retiring or rest rooms shall

be constructed and maintained for colored passengers in intrastate travel with like signs painted or shown in bold letters on the doors thereof, substituting the word "colored" for "white", and such owner or operator shall see that the closets or rest rooms are equally clean and in equally good sanitary condition.

"No white person shall enter, frequent, occupy or use the colored closets or rest rooms required by this act, and no colored person shall enter, frequent or occupy or use the white closets or rest rooms required by this act, except, however, regularly employed persons of the owner or operator of the passenger depots, bus stations or terminals may enter such closets or rest rooms in the discharge of their assigned duties.

"Any person violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) or confined in jail for not more than one year, or both." Source: Laws of 1956.

§ 2351.7—

"I. Any person traveling in intrastate travel by rail, bus, airline or other common carrier for hire who knowingly or wilfully enters or attempts to enter the waiting room not marked and provided for persons other than his or her race as required by law, shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than one thousand dollars ($1,000.00) and imprisoned in jail not more than sixty (60) days, or both such fine and imprisonment.

"2. No white person shall enter, frequent, occupy or use the colored waiting room of any depot, bus station or terminal when such waiting room is marked in bold letters as required by law; and no colored person shall enter, frequent, occupy or use the white waiting room of any depot, bus station or terminal when same is marked in bold letters as required by law, except, however, regularly employed persons of the owner or operator of depots, bus stations or terminals may enter same in the discharge of their assigned and required duties.

"Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) and imprisoned in jail for not more than one year, or both.

"3. No action or suit in law or in equity may be brought in any court of this state against any law enforcement officer for damages for false arrest of any passenger because of a violation of this act, nor shall any common carrier of passengers, or its employees be subject to suit for damages on account of such common carrier of passengers or its employees complying with the provisions of this act.

"4. In the event any part or parts of this act shall be held unconstitutional, the remaining portion of this act shall remain in full force and effect." Source: Laws of 1956.

§ 7784—

"Every railroad carrying passengers in this state shall provide equal but separate accommodations for

the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition to secure separate accommodations; and the conductor of such passenger train shall have power, and is required, to assign each passenger to the car, or the compartment of a car, used for the race to which such passenger belongs; and should any passenger refuse to occupy the car to which he or she is assigned by the conductor, the conductor shall have power to refuse to carry such passenger on the train, and for such refusal neither he nor the railroad company shall be liable for damages in any court." Source: Code of 1892.

§ 7785—

"All persons or corporations operating street railways and street or municipal buses, carrying passengers in this state, and every common carrier by motor vehicle of passengers in this state as defined by section 3 (e) of chapter 142 of the laws of 1938 (§ 7634, Code of 1942), shall provide equal, but separate, accommodations for the white and colored races.

"Every common carrier by motor vehicle of passengers in this state, as defined by section 3 (e) of chapter 142 of the laws of 1938 (§ 7634, Code of 1942), by buses or street cars operated entirely within the corporate limits of a municipality, or within a radius of 5 miles thereof, shall divide its passengers by the use of an appropriate sign 4 x 9 inches, for the purpose of, and in a manner that will "suitably provide for, a separation of the races, and all other buses and motor vehicles carrying passengers for hire in the

state of Mississippi shall use a latticed movable partition extending from the top of the seat to the ceiling of the vehicle, said partition not to obstruct the view of the driver of the vehicle to secure such separate accommodations; provided, however, that this act shall not apply to buses operated exclusively for the carrying of military personnel; and the operators of such passenger buses shall have power, and are required, to assign each passenger to the compartment of the bus used for the race to which such passenger belongs; and in no case shall any passenger be permitted to stand in the aisle of the compartment in which he does not belong and is not so assigned; and should any passenger refuse to occupy the compartment to which he or she belongs and is assigned, the operator shall have the power to refuse to carry such passenger on the bus; or should either compartment become so loaded in transit as not to permit the taking on of any further passengers for that compartment, then the bus operator shall not be required and shall refuse to take on any further passengers in violation of this act. Even though such additional passengers may have purchased and may hold tickets for transportation on the said bus, the only remedy said passengers shall have for failure or refusal to carry them under such circumstances is the right to a refund of the cost of his ticket, and for said refusal in either case neither the operator nor the common carrier shall be liable for damages in any court. Such partition may be made movable so as to allow adjustment of the space in the bus to suit the requirements of traffic." Source: Code of 1956.

Mississippi Segregation Statutes

§ 7786—

"The operators of such street cars and street buses and motor vehicles, as defined by chapter 142 of the laws of 1938 (§§ 7632-7687, Code of 1942) shall have power and are required to assign each passenger to the space or compartment used for the race to which such passenger belongs.

"Any passenger undertaking or attempting to go into the space or compartment to which by race he or she does not belong shall be guilty of a misdemeanor, and upon conviction, shall be liable to a fine of twenty-five dollars ($25.00), or, in lieu thereof, by imprisonment for a period of not more than thirty (30) days in the county jail; and any operator of any street car or street bus or motor vehicle as herein defined, assigning or placing a passenger to the space or compartment other than the said one set aside for the race to which said passenger belongs shall be guilty of a misdemeanor and, upon conviction, shall be liable to a fine of twenty-five dollars ($25.00), or, in lieu thereof, to imprisonment for a period of not more than thirty (30) days in the county jail." Source: Code of 1906.

§ 7786.01—

"Every person or corporation operating street railways and street or municipal buses, carrying passengers in this state, and every common carrier of passengers in this state by motor vehicle, as defined by section 3 (e) of chapter 142 of the laws of 1938 (§ 7634, Code of 1942), guilty of wilful and continued failure to observe or comply with the provisions of this act shall be liable to a fine of twenty-five dollars

($25.00) for each offense, and each day's violation of the provision hereof shall constitute a separate violation of this act; provided, however, that in the case of persons or corporations operating street railways and street or municipal buses, the fine shall be ten dollars ($10.00) instead of twenty-five dollars ($25.00)." Source: Laws of 1944.

§ 7787—

"All officers and directors of street railway companies who shall refuse or neglect to comply with the provisions and requirements of the two preceding sections shall be deemed guilty of a misdemeanor, on conviction shall be fined not less than one hundred dollars or be imprisoned in the county jail not less than sixty, and not more than six months, and any conductor or other employee of such street car company having charge of the same, who shall refuse or neglect to carry out the provisions of this chapter shall, on conviction, be fined not less than twenty-five dollars or be imprisoned in the county jail for not less than ten days nor more than thirty days for each and every offense; provided, that nothing herein contained shall be construed as applying to nurses attending children of the other race." Source: Code of 1906.

§ 7787.5—

"1. In all passenger depots, bus stations or terminals owned, operated or leased in the State of Mississippi by a railroad company, bus company or any other common carrier of passengers, the owner or operator thereof shall cause to be constructed and

maintained waiting or reception rooms as will secure the comfort of the passengers.

"In such depots, bus stations or terminals there shall be constructed, provided and maintained for the white intrastate passengers a separate waiting or reception room, on each entrance to which shall be painted or shown in bold letters the following:—"White waiting room, intrastate passengers"; and in such depot, bus station or terminal there shall be constructed, provided and maintained a separate waiting or reception room for the colored intrastate passengers, on each entrance to which shall be painted or shown in bold letters the following:—"Colored waiting room, intrastate passengers."

"2. Any common carrier of passengers for hire or any railroad or bus company, whether an individual or corporation, which fails or refuses to comply with the provisions of this act shall be liable in the penal sum of one thousand dollars ($1,000.00) per day for each day of such failure or refusal, to be recovered by suit filed in the county in which such depot, bus station or terminal is situated, by either the attorney general, the district attorney of the district, or the county attorney of the county in which said passenger depot, bus station or terminal is situated.

"In addition to the penalty provided herein, the Attorney General of the State of Mississippi or the district attorney of the district, or county attorney in the county in which said depot, bus station or terminal is situated may file suit in the chancery court of such county for a mandatory injunction to compel compliance with the provisions of this act, and the chancery

court of any county wherein the provisions of this act are not complied with shall have jurisdiction to issue an injunction to require compliance with this act, and to hold in contempt of court any railroad company, bus company or any other common carrier of passengers failing to comply with the orders and decrees of the court directing compliance with this act.

"3. The requirements of this act shall not be applicable to any person, firm or corporation operating a place of business wherein said person, firm or corporation acts only as ticket agent for a bus company or other common carrier in addition to his regular business and wherein no passenger waiting room or reception room is maintained." Source: Laws of 1956.

City Ordinance Requiring Carriers to Maintain Separate Facilities

AN ORDINANCE REQUIRING COMMON CARRIERS OF PERSONS TO MAINTAIN IN THE CITY OF JACKSON SEPARATE WAITING ROOM AND REST ROOM ACCOMMODATIONS AND FACILITIES FOR THE WHITE AND COLORED RACES; MAKING IT UNLAWFUL FOR ANY PERSON OF THE WHITE RACE TO USE SUCH ACCOMMODATIONS AND FACILITIES DESIGNATED AND SET APART FOR PERSONS OF THE COLORED RACES; MAKING IT UNLAWFUL FOR ANY PERSON OF THE COLORED RACES TO USE SUCH ACCOMMODATIONS AND FACILITIES DESIGNATED AND SET APART FOR PERSONS OF THE WHITE RACE; PRESCRIBING PENALTY FOR VIOLATION HEREOF; AND MAKING THIS ORDINANCE IMMEDIATELY EFFECTIVE.

WHEREAS, the citizens of the City of Jackson, Mississippi, have been accustomed for many generations to separation of the White race from the Colored races in the use of waiting room and rest room facilities and accommodations provided by common carriers of persons; and

WHEREAS, a sudden intermingling of the races necessarily involved in the common use of such waiting room and rest room accommodations and facilities would likely result in disturbances, breaches of the peace, disorder and confusion; and

WHEREAS, the Council of the said City of Jackson owes the duty to its citizens, regardless of race, color, creed or station in life, to maintain good order and to prevent breaches of the peace, and thereby to promote the health and general welfare of all its citizens, and it has power to adopt and enforce ordinances to accomplish such purposes;

City Ordinance Requiring Carriers to Maintain Separate Facilities

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF JACKSON, MISSISSIPPI:

SECTION 1. That all common carriers of persons which have heretofore provided and maintained separate waiting rooms, rest rooms and like accommodations and facilities be and they are hereby required to continue to maintain similar but separate waiting rooms, rest rooms and like accommodations and facilities for the White and for the Colored races, and to appropriately designate one of the said waiting rooms, rest rooms accommodations and facilities for use by persons of the White race only, and the other for use of persons of the Colored races only.

SECTION 2. That it shall be unlawful for any person of the White race to use as such the said accommodations so thus provided for use by persons of the Colored races only.

SECTION 3. That it shall be unlawful for any person of the Colored races to use as such the said accommodations so thus provided for use by persons of the White race only.

SECTION 4. That any person convicted of a violation of this ordinance shall be guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars ($25.00), nor more than one-hundred dollars ($100.00), or by imprisonment in the City Jail not to exceed thirty (30) days, or by both such fine and imprisonment.

SECTION 5. It having been found by the Council of the said City of Jackson, Mississippi, that in the preservation of good order and peace of the municipality, and in the promotion of the general welfare of its citizens, it is necessary for this ordinance to become immediately effective,

City Ordinance Requiring Carriers to Maintain Separate Facilities

and the same having been adopted by the unanimous vote of all the members of the governing body of said city, it is further ordained that this ordinance shall be and become effective immediately.

APPROVED:

Allen C. Thompson, Mayor
C. W. Alexander, Commissioner
D. L. Luckey, Commissioner

ATTEST:

Mrs. J. R. Skinner
City Clerk

(SEAL)

I, Mrs. J. R. Skinner, the duly appointed, qualified and acting City Clerk and lawful custodian of the minutes of the Council and seal of said city, certify that the foregoing is a true and exact copy of an Ordinance passed by the City Council at its regular meeting on January 12, 1956, and recorded in Minute Book "FF", page 149.

WITNESS my signature and official seal of office, this 12th day of January, 1956.

(SEAL)

Mrs. J. R. Skinner,
City Clerk

APPENDIX III

Opinion in *Rogers* Case

March 2, 1964.

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,722

JOHN LEE COPELAND,

vs.

STATE OF MISSISSIPPI.

RODGERS, *Justice*:

(Not to be Reported in State Reports)

This case is affirmed on the authority of *Thomas* v. *State*, No. 42,987, rendered February 17, 1964, and *Farmer* v. *State*, No. 42,983, this day decided.

AFFIRMED.

ALL JUSTICES CONCUR.

Note:

Opinions in substantially the same language as above were rendered in the *Ackerberg, Aelony, Anderson, Bevel, Donald, Filner, Nixon, Randolph, Reed, Harbour, Perlman, Myers, Peterson, Morton, Patton, Muse, O'Connor, K. Pleune, Davidov, Roland, McDonald,* and *J. Pleune* cases on March 2, 1964, and in the *Adler, Bromberg,* and *McKinnie* cases on March 9, 1964.

Judgment of Mississippi Supreme Court in *Thomas* Case

Monday, February 17th, 1964, Court Sitting:

No. 42,987

HENRY J. THOMAS,

vs.

STATE.

This cause having been submitted at a former day of this term on the record herein from the Circuit Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein—doth order and adjudge that the judgment of said Circuit Court rendered in this cause on November 14th, 1962 a conviction of breach of the peace and a sentence to pay a fine of $200.00 and serve 4 months in jail be and the same is hereby affirmed. It is further ordered and adjudged that the State of Mississippi do have and recover of and from Henry J. Thomas all of the cost of this appeal to be taxed for which let proper process issue.

Note:

Judgments in the other 28 cases were in substantially the same language as above; they merely reflect different lower court judgment dates, different words used to impose the same sentence, etc. Judgments were entered in the *Morton, Anderson, Aelony, Harbour, Copeland, Davidor, Filner,*

Judgment of Mississippi Supreme Court in Thomas Case

Muse, Myers, Donald, Perlman, McDonald, Patton, Nixon, Randolph, Farmer, O'Connor, Roland, Bevel, J. Pleune, Peterson, K. Pleune, Reed, and *Ackerberg* cases on March 2, 1964, and in the *Bromberg, McKinnie, Knight,* and *Adler* cases on March 9, 1964.

Order Overruling Suggestion of Error in *Thomas* Case

Monday, March 16, 1964, Court Sitting:

No. 42,987

HENRY J. THOMAS,

vs.

STATE.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled (R. 812).

Note:

Orders in identical language were entered in the *Ackerberg* (R. 303), *Adler* (R. 289), *Aelony* (R. 160), *Anderson* (R. 323), *Bevel* (R. 130), *Bromberg* (R. 122), *Copeland* (R. 140), *Davidov* (R. 140), *Donald* (R. 139), *Farmer* (R. 132), *Filner* (R. 132), *Harbour* (R. 120), *Knight* (R. 128), *McDonald* (R. 127), *McKinnie* (R. 127), *Morton* (R. 128), *Muse* (R. 143), *Myers* (R. 124), *Nixon* (R. 127), *O'Connor* (R. 124), *Patton* (R. 126), *Perlman* (R. 120), *Peterson* (R. 128), *K. Pleune* (R. 113), *Randolph* (R. 125), *Reed* (R. 119), *Roland* (R. 135) on April 6, 1964, and in the *J. Pleune* (R. 131) case on April 13, 1964.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

No. 181

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1964

HENRY J. THOMAS, JAMES FARMER, JOHN LEE COPELAND, ERNEST PATTON, JR., GRADY H. DONALD, PETER ACKERBERG, JAMES LUTHER BEVEL, PAULINE EDYTHE KNIGHT, CHARLES DAVID MYERS, CAROLYN YVONNE REED, JOSEPH JOHN McDONALD, RAYMOND RANDOLPH, JR., ALEXANDER ANDERSON, LESTER G. McKINNIE, WILLIAM E. HARBOUR, ZEV AELONY, MARVIN ALLEN DAVIDOV, CLAIRE O'CONNOR, DAVID KERR MORTON, KATHERINE A. PLEUNE, ROBERT FILNER, ELIZABETH S. ADLER, SANDRA NIXON, TERRY SUSAN PERLMAN, EDWARD J. BROMBERG, LESTRA ALENE PETERSON, THOMAS VAN ROLAND, JOAN FRANCES PLEUNE AND GRANT HARLAN MUSE, JR. ..... Petitioners

vs.

STATE OF MISSISSIPPI ..... Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

JOE T. PATTERSON
Attorney General
State Of Mississippi

BY JOHN A. TRAVIS
Special Assistant Attorney General
Electric Building
Jackson, Mississippi

BY ROBERT G. NICHOLS, JR.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 181

HENRY J. THOMAS, JAMES FARMER, JOHN LEE COPELAND, ERNEST PATTON, JR., GRADY H. DONALD, PETER ACKERBERG, JAMES LUTHER BEVEL, PAULINE EDYTHE KNIGHT, CHARLES DAVID MYERS, CAROLYN YVONNE REED, JOSEPH JOHN McDONALD, RAYMOND RANDOLPH, JR., ALEXANDER ANDERSON, LESTER G. McKINNIE, WILLIAM E. HARBOUR, ZEV AELONY, MARVIN ALLEN DAVIDOV, CLAIRE O'CONNOR, DAVID KERR MORTON, KATHERINE A. PLEUNE, ROBERT FILNER, ELIZABETH S. ADLER, SANDRA NIXON, TERRY SUSAN PERLMAN, EDWARD J. BROMBERG, LESTRA ALENE PETERSON, THOMAS VAN ROLAND, JOAN FRANCES PLEUNE AND GRANT HARLAN MUSE, JR. ..... Petitioners

vs.

STATE OF MISSISSIPPI ..... Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

STATEMENT IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, before answering Petitioners' reasons for granting the Writ as set out on page 32 of their Petition for Writ of Certiorari, feels that it is necessary to point out several discrepancies contained in the Statement (Petition, p. 7).

While it is true that each Petitioner was tried separately, no motion was filed with the Trial Court for consolidation of any of the cases prior to trial. After

trial, there is no procedure known to Mississippi practice where an appellate court can consolidate cases on appeal. Had the motion been made prior to trial, the Defendants arrested at the same time and place would have had to be tried together or the trial court would have been in error. Petitioners are in error when they state that the State of Mississippi "required a separate trial" (Petition, p. 9, n. 8). They are also in error when they say all were convicted (see affivadit of Circuit Clerk of Hinds County, Mississippi, appended hereto as Appendix I). Further, Petitioners fail to inform this Court that all those convicted were convicted in jury trials.

The statement of Petitioners that the witness Captain of Police Ray "had numerous police officers on the scene for the purpose of arresting them and a patrol wagon parked outside to carry Petitioners off to jail" (Petition, p. 10) is contained in none of the thirty (30) transcripts of the trials of Petitioners and exists only in the minds of Petitioners' brief writers.

Petitioners complain at length about the cash bonds which were posted by various organizations such as the Congress of Racial Equality, National Association for the Advancement of Colored People and others. They state that no surety company in Mississippi would handle their appeal and appearance bond business (Petition, p. 9, n. 8). Surety companies usually are highly skeptical of transient clients and, since these Petitioners were all from without the State of Mississippi, it is nothing out of the ordinary for a surety company to refuse such business without the posting of one hundred percent collateral. Of course, Petitioners fail to mention why they chose to post full collateral with the State of Mississippi rather than a private company. Also, they fail to point out that, not in one instance, did they attempt to follow

the usual procedure of getting two landowners to post a property bond as allowed under Mississippi law. Section 1175, Mississippi Code of 1942, as amended.

As concerns the group arrested on May 24, 1961, the witness Shoemaker did not make the statements ascribed to him (Petition, p. 13) on pages 541, 544, 545 and 546 of the Thomas record. These are statements of the witness Ray. However, the witness Shoemaker did make the following statements:

"Q. Now how many of these people were there in there that were not police officers or people that you didn't know?

A. Thirty-five or forty.

Q. All right sir. Did you talk to any of these?

A. Some of them, yes.

Q. Were you able to form an opinion, based upon the conversations you had with these people that were in the station, as to how they felt about the arrival ot this Defendant?

A. Yes.

Q. And the people with him. And what is that opinion?

A. They had no intention of greeting him with any glad hand.

Q. Well, just what do you mean by that?

A. They came to do him harm, generally."

(R. Thomas 510).

On cross-examination of the witness Shoemaker, the record reflects:

"Q. Did you see any citizen of Jackson start toward these freedom riders in any way when they came in, run toward them, walk hurriedly toward them?

A. There was a crowd of people gathered around them quickly when they came in sight, and the police had them to move back."

(R. Thomas 519).

As concerns the arrests made on May 28, 1961, (Petition, p. 16), Captain Ray may have admitted that no overt act was committed but Respondent would point out that this is immaterial as these Petitioners were not charged with an *attempt* but with the actual commission of a breach of the peace.

OPPOSITION TO REASONS FOR GRANTING WRIT

I.

THE CONVICTIONS OF PETITIONERS DO NOT OFFEND DUE PROCESS. Respondents do not deny the right of Petitioners to use interstate transportation facilities in the City of Jackson, Mississippi. Petitioners do not deny the holding of this Court in *Boynton v. Virginia*, 364 US 454, and the other cases cited by Petitioners (Petition, p. 32). However, Respondent asserts that when a person breaches the peace by conduct which will incite violence, the State may exercise its police power by ordering such a person to move out of that vicinity. The witness Ray recites in all of the thirty (30) cases at bar that he was of the opinion that breach of the peace was about to occur. These Petitioners were arrested under a valid statute with ample proof being presented to a jury of each of Petitioners' guilt.

II.

SECTION 2087.5, MISSISSIPPI CODE OF 1942, AS AMENDED, RECITED IN FULL IN THE PETITION FILED HEREIN (PETITION, P. 4), IS NOT SO VAGUE, UNCERTAIN AND INDEFINITE AS TO CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. A criminal statute must be sufficiently definite to give notice of required conduct to one who would avoid its penalties and to guide the judge in its application and the lawyer in defending one charged with its violation. *Boyce Motor Lines v. United States*, 342 US 337, *People v. Galamison* (1964), 250 N.Y.S. 2d 325.

The decision of *Edwards v. South Carolina*, 372 US does not apply here. In that case, there was no evidence that any of the crowd of onlookers actually caused or threatened any trouble. Here, in every arrest, there was the element of potential violence from the crowds gathered around the Petitioners. In truth, the facts here more closely parallel those in *Feiner v. New York*, 340 US 315.

Section 2087.5, Mississippi Code of 1942, as amended, adequately gives notice of the required conduct to one who would avoid its penalties. The opinion of Justice Gillespie in *Farmer v. Mississippi* (Petition, Appendix, p. 38A) sets out the constituent elements of the offense charged. All of the elements were proved in each trial. The enforcing officer has adequate guides in situations when he determines that violence is about to erupt to order persons to move on.

III.

THESE CONVICTIONS DO NOT CONSTITUTE STATE ENFORCEMENT OF RACIAL SEGREGATION IN INTERSTATE FACILITIES CONTRARY

TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Certainly Respondent cannot deny the existance of the statutes requiring racial segregation as recited by Petitioners (Petition, p. 41). However, Respondent denies that any of these statutes were enforced against any of Petitioners. These Petitioners were arrested under the provisions of Section 2087.5, Mississippi Code of 1942, which is almost identical with a New York State statute. New York Penal Law, Consol. Laws, C.49, Section 722. Many states which have not been concerned with segregation statutes on their books have similar laws. The power granted a policeman on a beat to require citizens to move out of a given area when the officer has a valid reason for doing so is a basic concept in the matter of preserving the peace of a community. This statute was upheld in *People v. Galamison,* supra, when the New York Supreme Court felt that "the conduct of the defendants was likely to occasion a breach of the peace."

IV.

THESE CONVICTIONS DO NOT CONFLICT WITH FIRST AMENDMENT GUARANTEES OF FREE SPEECH, ASSEMBLY AND ASSOCIATION.

Again, Respondent asserts that *Edwards v. South Carolina,* 377 US 229, has no application here. Respondent would show that there was ample evidence in each arrest of impending violence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be denied.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of Mississippi

JOHN A. TRAVIS
Special Assistant Attorney General

ROBERT G. NICHOLS, JR.
Special Assistant Attorney General

CERTIFICATE

I, Robert G. Nichols, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have mailed a true copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Mississippi to the following counsel of record for the Petitioners, via United States mails, postage prepaid, to-wit:

Jack Greenberg
James M. Nabrit, III
Derrick A. Bell, Jr.
10 Columbus Circle
New York, New York 10019

Jack Young
Carsie Hall
115½ North Farish Street
Jackson, Mississippi

R. Jess Brown
125½ North Farish Street
Jackson, Mississippi

This the 2nd day of November, 1964.

Special Assistant Attorney General

APPENDIX

STATE OF MISSISSIPPI
COUNTY OF HINDS

This day personally appeared before me, the undersigned authority in and for the state and county aforesaid, duly commissioned by law to administer oaths and take acknowledgments, Robert Lilly, who, being by me first duly sworn, states on his oath:

1. That, affiant is a Deputy Clerk of the County Court of the First Judicial District of Hinds County, Mississippi;

2. That, affiant is fully familiar with the records of the Office of the Circuit Clerk of Hinds County, Mississippi, the Clerk of same serving also as the Clerk of the County Court of Hinds County, Mississippi;

3. That, affiant has searched the dockets of the County Court of the First Judicial District of Hinds County, Mississippi and finds that the following cases, each defendant being charged therein with a violation of Section 2087.5, Mississippi Code of 1942, as amended, and each defendant being a part of the group of cases commonly known as "Freedom Riders", and that the dockets of said cases reflect the following disposition by the said Court:

Docket No.	*Defendant*	*Disposition*
12,655	James Thomas Carey	5-1-62 - Motion for directed verdict sustained;
12,723	Mark Lane	3-30-62 - Motion for directed verdict sustained;

Docket No.	*Defendant*	*Disposition*
12,733	Orville Bert Luster	5-1-62 - Directed verdict for defendant;
12,777	Kenneth Martin Shilman	12-14-61 - Directed verdict for defendant;
12,782	Felix Jacques Singer	12-23-62 - Directed verdict for defendant;
12,788	Percy E. Sutton	3-30-62 - Defendant dismissed on request of Pros. Atty.;
12,796	Daniel Ray Thompson	12-28-61 - Directed verdict for defendant;
12,806	O'Neal Vance	1-5-62 - Directed verdict for defendant;
12,815	Ralph Edward Washington	1-23-62 - Directed verdict for defendant;
12,841	Ray A. Cooper	5-21-62 - nolle prosequi;
12,850	Percy Lee Johnson	3-27-62 - Directed verdict for defendant;
12,851	James Wilson Jones	3-22-62 - Directed verdict for defendant;

Docket No.	*Defendant*	*Disposition*
12,907	Morton Bruce Slater	4-24-62 - Directed verdict for defendant;
12,928	Gilbert S. Avery, III	4-9-62 - Directed verdict for defendant;
12,929	James Pleasant Breeden	4-9-62 - Directed verdict for defendant;
12,930	Myron B. Bloy, Jr.	5-21-62 - nolle prosequi;
12,931	John Cracker, Jr.	5-21-62 - nolle prosequi;
12,932	John Marvin Evans	5-21-62 - nolle prosequi;
12,933	James Walker Evans	5-21-62 - nolle prosequi;
12,934	Quinland Reeves Gordon	5-21-62 - nolle prosequi;
12,935	John B. Morris	5-21-62 - nolle prosequi;
12,936	Robert Laughlin Pierson	5-21-62 - nolle prosequi;
12,937	Geoffrey Sedgewick Simpson	5-21-62 - nolle prosequi;
12,938	William Andrew Wendt	5-21-62 - nolle prosequi;
12,939	Vernon P. Woodward	5-21-62 - nolle prosequi;

Docket No.	*Defendant*	*Disposition*
12,940	Merrill Orne Young	5-21-62 - nolle prosequi;
12,941	James Garrard Jones	5-22-62 - Defendant not guilty - discharged;
12,942	Robert P. Taylor	5-21-62 - nolle prosequi;
13,165	Lavert H. Taylor	5-21-62 - nolle prosequi;
13,166	Charles Andre Jones	5-21-62 - nolle prosequi;
13,167	Glenda Faye Jackson	5-21-62 - nolle prosequi;

4. Further affiant saith not.

/s/ ROBERT LILLY

SWORN TO AND SUBSCRIBED BEFORE ME this 26 day of October, 1964.

H. T. ASHFORD, JR., Circuit Clerk
By /s/ R. D. Thompson, D.C.

(SEAL)

MY COMM. EX:_____

Office-Supreme Court, U.S.
FILED
DEC 3 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 181

HENRY J. THOMAS, JAMES FARMER, JOHN LEE COPELAND, ERNEST PATTON, JR., GRADY H. DONALD, PETER ACKERBERG, JAMES LUTHER BEVEL, PAULINE EDYTHE KNIGHT, CHARLES DAVID MYERS, CAROLYN YVONNE REED, JOSEPH JOHN McDONALD, RAYMOND RANDOLPH, JR., ALEXANDER ANDERSON, LESTER G. McKINNIE, WILLIAM E. HARBOUR, ZEV AELONY, MARVIN ALLEN DAVIDOV, CLAIRE O'CONNOR, DAVID KERR MORTON, KATHERINE A. PLEUNE, ROBERT FILNER, ELIZABETH S. ADLER, SANDRA NIXON, TERRY SUSAN PERLMAN, EDWARD J. BROMBERG, LESTRA ALENE PETERSON, THOMAS VAN HOLAND, JOAN FRANCES PLEUNE and GRANT HARLAN MUSE, JR.,

Petitioners,

—v.—

STATE OF MISSISSIPPI.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Of Counsel

In the

Supreme Court of the United States

October Term, 1963

No. 181

Henry J. Thomas, James Farmer, John Lee Copeland, Ernest Patton, Jr., Grady H. Donald, Peter Ackerberg, James Luther Bevel, Pauline Edythe Knight, Charles David Myers, Carolyn Yvonne Reed, Joseph John McDonald, Raymond Randolph, Jr., Alexander Anderson, Lester G. McKinnie, William E. Harbour, Zev Aelony, Marvin Allen Davidov, Claire O'Connor, David Kerr Morton, Katherine A. Pleune, Robert Filner, Elizabeth S. Adler, Sandra Nixon, Terry Susan Perlman, Edward J. Bromberg, Lestra Alene Peterson, Thomas Van Roland, Joan Frances Pleune and Grant Harlan Muse, Jr.,

Petitioners,

—v.—

State of Mississippi,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Respondent's Incorrect Statement of Facts

The respondent, in its response to the petition for writ of certiorari, claimed that the petitioners had made several misstatements of fact in the petition. Petitioners will re-

spond to each of the major errors alleged by the respondent.

(1) Respondent states that the petitioners failed to inform this court that all convictions were had in jury trials (p. 2, end of ¶1—respondent's brief). Petitioners in the last paragraph of their petition on page 27 informed the court that all petitioners were found guilty in jury trials.

(2) Respondent states that witness Shoemaker did not make the statements ascribed to him in the petition at page 13 cited from pages 541, 544, 545, and 546 of the Thomas record. Respondent states that the witness, Captain J. L. Ray, was testifying at these pages (Respondent's brief, p. 3). Respondent evidently used the incorrect pagination which occurs at the top of the page in the record, which pages were the numbering of only the transcript of testimony. The statements petitioners ascribed to witness Shoemaker do occur at pages 541-546 if the correct pagination which appears at the bottom of the page in the record is consulted.

(3) Respondent claims that the statement that Captain of Police Ray had "numerous" officers and a patrol wagon for the purpose of arresting and carrying petitioners to jail was not in any of the thirty transcripts of trial and existed "only in the minds of petitioners' brief writers". (Respondent's brief, p. 2).

The first arrest occurred on May 24, 1961 and included petitioners Anderson and Bevel at 2:00 p.m. and petitioners Thomas, Farmer, Copeland, Patton, Donald, and Eckerberg at 4:45 p.m. The Thomas record covering 5 other petitioners discloses that Captain J. L. Ray had conferences with other public and city officials in contemplation of the arrival of the freedom riders (R. Thomas, 601). Two days prior to the arrival of any of the freedom riders, Captain

Ray had made plans as to where to place his men upon their arrival in the travel facilities (R. Thomas, 562). The total police force for the City of Jackson, Mississippi including plainclothesmen was approximately 200 to 230 (R. Thomas, 551). The captain's best estimate as to the total number of policemen used on May 24, 1961 to handle the coming of petitioners was approximately 75 men, with 6 officers inside the terminal and 7 officers immediately outside the terminal (R. Anderson, 224). On subsequent occasions other than that concerning the 7 petitioners accompanying Thomas and Anderson, the following numbers of police were deployed at the travel facilities where the arrests occurred:

Place	*Date*	*Officers*	*Citation*
Trailways Continental Bus Station	May 28, 1961	12 to 15	(R. Knight 16)[1]
	June 2, 1961	16	(R. Reed 17)
	June 7, 1961	16	(R. Randolph 17)
Greyhound Bus Terminal	May 28, 1961	"a detail of men"	(R. McKinnie 15)
	June 11, 1961	10 or 11	(R. Aelony 18)[2]
	June 16, 1961	6	(R. Adler 22)
Illinois Central Train Station	May 30, 1961	12	(R. Nixon 14)
	June 9, 1961	12	(R. Bromberg 20)
	June 20, 1961	10 to 12	(R. Muse 23)[3]

[1] The citation of the record from petitioner Knight covers petitioner Myer with whom he was arrested.

[2] Petitioners Davidov, O'Connor and Morton were arrested with petitioner Aelony.

[3] Petitioners Peterson, Van Roland and Pleune were arrested with petitioner Muse.

The arresting officer testified this was an "unusual" number of police to deploy at the terminals (R. Knight 16; Reed 17-18).

In response to a question as to whether there was a paddy wagon waiting near the station before the arrival of petitioner Thomas and his companions, Capt. Ray answered "yes" (R. Thomas 625-626). The wagon held approximately 15 to 16 persons (R. Thomas 626). Witness Shoemaker said he saw the paddy wagon present at the bus terminal prior to the arrival of each of the two groups of freedom riders on May 24, 1961 (R. Thomas 545).

In most instances the arresting officers testified they had "advance notice" that the petitioners were coming to "cause trouble" or "create an incident" (R. Thomas, 573-574; Bevel, 18; Knight, 16-17; Reed, 17-18; Randolph, 17; McKinnie, 16; Aelony, 17; Adler, 17; Perlman, 15-16; Nixon, 15; Bromberg, 15-16; Muse, 21-23). In each instance only the petitioners were arrested by officers who thought they were the cause of the trouble by their mere presence (R. Thomas, 624; Bevel, 28; Knight, 24, 25; Reed, 27-29; Randolph, 19; McKinnie, 22-23; Davidov, 30-31; Filner, 19; Nixon, 18; Perlman, 23; Bromberg, 22-23; Muse, 50-51). The record thus clearly defines the situation as petitioners stated: Captain Ray had determined in advance that the petitioners were the parties who would have to be arrested and he had additional police and equipment to do so.

Argument

Respondent's argument as to the legality of petitioners' convictions is based mainly on an attempt to distinguish *Edwards* v. *South Carolina*, 372 U. S. 229 and to rely on *Feiner* v. *New York*, 340 U. S. 315.

The facts surrounding petitioners' arrest more closely parallel those in *Taylor* v. *Louisiana*, 370 U. S. 154, *Henry* v *Rock Hill*, —— U. S. ——, 12 L. Ed. 2d 79 and *Edwards* v. *South Carolina supra*. Petitioners were peacefully exercising a clear right to use interstate travel facilities on a racially desegregated basis. There is a long line of authority for the proposition that if petitioners engaged in a constitutionally protected protest against racial discrimination, they cannot be punished criminally because other persons threaten them with violence. *Cooper* v. *Aaron*, 358 U. S. 1; *Buchanan* v. *Warley*, 245 U. S. 60; *Terminiello* v. *Chicago*, 337 U. S. 1. Were this not so, no person, Negro or white, opposed to racial segregation could risk speaking his views in a state such as Mississippi which has a long history of implacable, violent and widespread opposition to racial equality.

Feiner v. *New York supra* does not present the same factual circumstances as the instant cases. The nature of defendant Feiner's speech was entirely different from petitioners', as Feiner urged his listeners to arm themselves and engage in violence. *Feiner* v. *New York supra* at p. 317. Further, the court in *Feiner* found that:

> "There was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions" at p. 319.

The records here are replete with evidence that the multiple arrests of petitioners, each day they appeared over

a two-month period, were a systematic design to enforce racial segregation. Here, there was no single arrest by two police officers sent to cover an emergency circumstance they had no foreknowledge of, as in *Feiner,* but rather a planning by police officers in advance to arrest all petitioners on some pre-supposition that they were coming to "cause trouble", which in fact meant they were coming to breach segregation customs. The official resistance of the State of Mississippi to racial desegregation is a well-known fact, and state officials, including the police, are required by statute to use their office to thwart racial desegregation. Miss. Code Section 4063.3.

Respondent's position may be summarized as (a) misplaced reliance on *Feiner* v. *New York, supra* (b) claiming errors in petitioners' statement of the facts which were not errors but represent only respondent's reference to inapposite pagination; and (c) an incomplete reading of petitioners' brief.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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